Supreme Court, U.S.
FILED

10-103 JUL 19 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ARCHSTONE MULTIFAMILY SERIES I TRUST
and ARCHSTONE,

Petitioners,

v.

NILES BOLTON ASSOCIATES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the Fourth Circuit held that a developer who acknowledged liability and settled claims asserting violations of the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, could not seek indemnification under state law from the architect that directly caused those violations. According to the court of appeals, these statutes impliedly preempt state-law claims that could reduce the incentives for compliance, even though the FHA and ADA are strict-liability statutes that impose liability on developers and others without regard to fault.

The question presented is whether a federal statutory scheme that creates liability without regard to fault, that is entirely silent with respect to the eventual allocation of liability among co-defendants, and that contains no express preemption provision nonetheless impliedly preempts state-law claims for indemnification.

RULE 14.1(b) STATEMENT

The parties to the proceedings below were defendants/cross-plaintiffs/appellants Archstone Multifamily Series I Trust and Archstone; defendant/cross-defendant/appellee Niles Bolton Associates, Inc.; plaintiffs the Equal Rights Center, the American Association of People with Disabilities, and the United Spinal Association; and defendants Clark Realty Builders, LLC, Vika Incorporated, and Meeks Partners.*

Only the parties included in the caption have an interest in this sub-proceeding; the remaining plaintiffs and defendants—the Equal Rights Center, the American Association of People with Disabilities, the United Spinal Association, Clark Realty Builders, LLC, Vika Incorporated, and Meeks Partners—do not.

RULE 29.6 STATEMENT

Petitioner Archstone Multifamily Series I Trust states that its parent entity is Archstone Nominee LP. The parent of Archstone Nominee LP is Archstone Multifamily Principal LP, and the parents of Archstone Multifamily Principal LP are Archstone Multifamily Guarantor LP and Archstone Multifamily Parallel Guarantor I LLC.

Archstone Multifamily Series I Trust further states that three public corporations collectively hold, indirectly, approximately 93% of the equity in

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* The National Multi Housing Council appeared as an *amicus curiae* in the district court, see Dist. Ct. Dkt. Nos. 71, 72, 75, but was mistakenly listed as a defendant in that court's docketing system as well as in the caption of the court of appeals' decision. See App., *infra*, 1a.

it: Bank of America, N.A. Barclays Bank PLC, and Lehman Brothers Holdings, Inc.

Similarly, Archstone states that, in addition to individual preferred unit holders, it has four parent entities: Archstone Multifamily Series I Trust, Archstone Multifamily Series II LLC, Archstone Multifamily Series III LLC, and Archstone Multifamily Series IV LLC. The parent entity of Archstone Multifamily Series I Trust, Archstone Multifamily Series II LLC, and Archstone Multifamily Series III LLC, is Archstone Nominee LP. The parent of Archstone Nominee LP is Archstone Multifamily Principal LP. The parent entity of Archstone Multifamily Series IV LLC is Archstone Multifamily Series IV Nominee LP, and the parent of that entity is Archstone Multifamily Series IV Principal LP.

Archstone further states that three public corporations collectively hold, indirectly, approximately 87% of the equity in it: Bank of America, N.A. Barclays Bank PLC, and Lehman Brothers Holdings, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
RULE 14.1(b) STATEMENT ii
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT 2
A. Statutory Background 3
B. Factual Background 8
REASONS FOR GRANTING THE PETITION 11
A. The Holding Below Exacerbates A Circuit Split Over When Federal Statutes Preempt State-Law Indemnification Remedies 12
B. Review Is Also Warranted Because The Decision Below Is Inconsistent With This Court's Conflict-Preemption Precedents And Is Clearly Incorrect 24
C. The Issue Here Is Of Substantial Practical Importance 29
CONCLUSION 33
APPENDICES
A. The Fourth Circuit's Opinion 1a
B. The District Court's Opinion 16a
C. The District Court's March 18, 2009 final order 39a

TABLE OF CONTENTS–continued

Page

D. Relevant Provisions of the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601 *et seq.* 41a

E. Relevant Provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.* 47a

F. 28 C.F.R. § 36.201 ..... 59a

TABLE OF AUTHORITIES

Page(s)

CASES

Access4All, Inc. v. *Trump Int'l Hotel & Tower Condo.*, No. 04-CV-7497, 2007 WL 633951 (S.D.N.Y. Feb. 26, 2007) 30

Andover Newton Theological Sch., Inc. v. *Cont'l Cas. Co.*, 930 F.2d 89 (1st Cir. 1991) 31

Archstone-Smith Trust v. *Architects Orange*, No. 37-2008-00092239, slip. op. (Cal. Sup. Ct. June 12, 2009) 17

Archstone-Smith Trust v. *Van Tilburg*, No. 08-CV-8351, slip op. (Colo. Dist. Ct. Nov. 6, 2009) 17

Baker, Watts & Co. v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc) ..... *passim*

Baltimore Neighborhoods, Inc. v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661 (D. Md. 1998) 5, 28, 29

Botosan v. *Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000) 27, 30

Brock v. *Gingerbread House, Inc.*, 907 F.2d 115 (10th Cir. 1989) 16

Cover v. *Hydramatic Packing Co.*, 83 F.3d 1390 (Fed. Cir. 1996) 19, 20, 21

Delay v. *Rosenthal Collins Group, LLC*, 585 F.3d 1003 (6th Cir. 2009) 20, 21, 22, 23

Delay v. *Rosenthal Collins Group, LLC*, No. 2:07-CV-568, 2008 WL 2225717 (S.D. Ohio May 27, 2008) 20

Eichenholtz v. *Brennan*, 52 F.3d 478 (3d Cir. 1995) 14

TABLE OF AUTHORITIES—continued

Page(s)

Ellison v. *Shell Oil Co.*,
882 F.2d 349 (9th Cir. 1989) 27

Engvall v. *Soo Line R.R. Co.*,
632 N.W.2d 560 (Minn. 2001) 22, 23

Foley v. *Luster*,
249 F.3d 1281 (11th Cir. 2001) 17, 18, 19, 21

Franklin v. *Kaypro Corp.*,
884 F.2d 1222 (9th Cir. 1989) 14

Havens Realty Corp. v. *Coleman*,
455 U.S. 363 (1982) 3

Herman v. *RSR Sec. Serv. Ltd.*,
172 F.3d 132 (2d Cir. 1999) 23

Herrero v. *Atkinson*,
38 Cal. Rptr. 490 (Cal. Ct. App. 1964) 12

Johanson v. *Huizenga Holdings, Inc.*,
963 F. Supp. 1175 (S. D. Fla. 1997) 6

Johnson v. *Couturier*,
572 F.3d 1067 (9th Cir. 2009) 14

Jones v. *Rath Packing Co.*,
430 U.S. 519 (1977) 25

Lonberg v. *Sanborn Theaters Inc.*,
259 F.3d 1029 (9th Cir. 2001) 6

Martin v. *Gingerbread House, Inc.*,
977 F.2d 1405 (10th Cir. 1992) 12, 15, 16

Meyer v. *Holley*,
537 U.S. 280 (2003) 26, 27

Miami v. *HDR Eng'g, Inc.*, No. 09-57028 CA
30 (Fla. Cir. Ct. Feb. 12, 2010) 17

TABLE OF AUTHORITIES—continued

Page(s)

Montana Fair Housing, Inc. v. *American Capital Dev., Inc.*, 81 F. Supp. 2d 1057 (D. Mont. 1999) 5

Saranillio v. *Silva*, 889 P.2d 685 (Haw. 1995) 28

Solo Cup Co. v. *Fed. Ins.* Co., 619 F.2d 1178 (7th Cir. 1980) 31

United States v. *Days Inns of Am., Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998) 5

United States v. *Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997) 6

United States v. *Murphy Dev., LLC*, No. 3:08-0960, 2009 WL 3614829 (M.D. Tenn. Oct. 27, 2009) 23

United States v. *Quality Built Constr., Inc.*, 309 F. Supp. 2d 756 (E.D.N.C. 2003) 4

United States v. *Tanski*, No. 1:04-CV-714, 2007 WL 1017020 (N.D.N.Y. Mar. 30, 2007) 28

Wyeth v. *Levine*, 129 S. Ct. 1187 (2009) 25, 26

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. Art. VI, cl. 2 1

ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 2

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, Pub. L. 101-336, 104 Stat. 327 2

42 U.S.C. § 12101(b) 5, 6

TABLE OF AUTHORITIES—continued

Page(s)

42 U.S.C. § 12116 7
42 U.S.C. § 12182 6
42 U.S.C. § 12182(a) 6
42 U.S.C. § 12183 ..... 6, 20
42 U.S.C. § 12183(a) 7
42 U.S.C. § 12183(a)(1) 7, 14
42 U.S.C. § 12186(a) 7
42 U.S.C. § 12186(b) 8
42 U.S.C. § 12188(a) 7
42 U.S.C. § 12188(b)(5) 7
Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 1
Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.*, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 1
42 U.S.C. § 3601 ..... 2, 3, 15
42 U.S.C. § 3604 ..... 2, 20
42 U.S.C. § 3604(f)(1) 3
42 U.S.C. § 3604(f)(3) 3, 4, 5, 14
Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 ..... 2, 3
Locomotive Inspection Act (LIA), Pub. L. No. 103-272, 108 Stat. 745 (1994) 22
Securities Act of 1933, 15 U.S.C. § 77l, Pub. L. No. 7322, 48 Stat. 74 13
17 U.S.C. § 106(1) 17
17 U.S.C. § 301(a) 18
28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES—continued

Page(s)

49 U.S.C. § 20701(1) 22
17 C.F.R. § 166.3 20
28 C.F.R. § 36.104 7
28 C.F.R. § 36.201(b) 2, 8, 30

OTHER AUTHORITIES

56 Fed. Reg. 9471 (Mar. 6, 1991) 4

Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 Hastings Women's L.J. 93 (2006) 32

Andrew M. Johnston, Amy L. Simmerman, Jeffrey M. Gorris, *Recent Delaware Law Developments in Advancement and Indemnification: An Analytic Guide*, 6 N.Y.U. J. L. & Bus. 81 (2009) 32

Wallace P. Mullin & Christopher M. Snyder, *Should Firms Be Allowed To Indemnify Their Employees for Sanctions?*, 26 J.L. Econ. & Org. 30 (2010) 31

Restatement (Third) of Torts: Apportionment of Liability §§ A18, 23 (2000) 29, 30

Robert G. Schwemm, *Barriers to Accessible Housing: Enforce-ment Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. Rich. L. Rev. 753 (2006) 4, 5

Helen S. Scott, *Resurrecting Indemnification: Contribution Clauses In Underwriting Agreements*, 61 N.Y.U. L. Rev. 223 (1986) 28

TABLE OF AUTHORITIES—continued

Page(s)

Earl B. Slavitt & Donna J. Pugh, *Sticks and Bricks, Dollars and Sense: The ADA and Nonresidential Real Estate*, 81 Ill. B.J. 314 (1993) 32

Roger W. Stone & Jeffrey A. Stone, *Indemnity In Iowa Construction Law*, 54 Drake L. Rev. 125 (2005) 31, 32

PETITION FOR A WRIT OF CERTIORARI

Petitioners Archstone Multifamily Series I Trust and Archstone (collectively Archstone) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–15a) is reported at 602 F.3d 597. The opinion of the district court (App., *infra*, 16a–38a) is reported at 603 F. Supp. 2d 814. The March 18, 2009, final order and judgment of the district court (App., *infra*, 39a–40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause specifies that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * *, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

The relevant provisions of the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601 *et seq.*, as enacted by Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89, and as

amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, are reproduced in the appendix. See App., *infra*, 41a–46a (reproducing 42 U.S.C. §§ 3601, 3604).

The relevant provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, Pub. L. 101-336, 104 Stat. 327, as amended by the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, are also reproduced in the appendix. See App., *infra*, 47a–58a (reproducing 42 U.S.C. §§ 12101, 12182, 12183).

Finally, 28 C.F.R. § 36.201, a relevant Department of Justice regulation implementing the ADA, is reproduced in the appendix. See App., *infra*, 59a.

STATEMENT

This case presents a deep conflict among the lower courts over when a federal statute that is silent as to the eventual allocation of responsibility among jointly liable parties impliedly preempts state-law methods for allocating the costs of coming into compliance with that federal statute. Here, the Fourth Circuit held that the ADA and FHA preclude the developer of multi-family housing developments from bringing state-law breach-of-contract, indemnification, and professional-negligence claims against the architect that mis-designed those buildings such that they failed to comply with federal disability-access requirements. That decision exacerbates an existing conflict over when federal statutes preempt state-law indemnification remedies; has no basis in the text, purpose, or history of the governing statutes; and could wreak havoc not only on owners of housing developments but also on the entire run of American commerce—every entity whose business is

governed even in part by a federal regulatory scheme. Certiorari is therefore warranted.

A. Statutory Background

1. Congress enacted the Fair Housing Act of 1968 with the explicit policy of providing for "fair housing throughout the United States." 42 U.S.C. § 3601. The statute initially prohibited discrimination on the basis of race, color, religion, or national origin in all housing-related transactions. Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89 (1968). Thus, the FHA prohibited housing providers, municipalities, lending institutions, and insurance companies from refusing to sell or rent a property; discriminating as to the terms, conditions, privileges, or provision of services of a sale or rental property; or representing that a unit is unavailable to someone because of his or her race, color, religion, or national origin. *Ibid.*; see also *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982).

In 1988, Congress enacted the Fair Housing Amendments Act, which extended the FHA's protections to persons with disabilities. Pub. L. No. 100-430, 102 Stat. 1619 (1988). As amended, Section 3604 states that it shall be unlawful to "discriminate in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). That section defines discrimination to include (A) "a refusal to permit * * * reasonable modifications of existing premises"; (B) "a refusal to make reasonable accommodations in rules, policies, practices, or services"; and (C) "a failure to design and construct [covered multifamily] dwellings in * * * a manner" that is readily accessible to persons with disabilities, including persons in wheelchairs. 42 U.S.C. § 3604(f)(3)(A)–(C).

The statute contains detailed requirements governing the design of covered multifamily dwellings, specifying for example that they must be designed with:

> (I) an accessible route into and through the dwelling;
>
> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
>
> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
>
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. § 3604(f)(3)(C)(iii). The Fair Housing Accessibility Guidelines, promulgated by the U.S. Department of Housing and Urban Development (HUD), prescribe exact measurements required for minimum compliance with these rules, including, for example, the specific width of doorframes and the precise placement of light switches. See, *e.g.*, 56 Fed. Reg. 9471, 9506–07 (Mar. 6, 1991).

Under the statute, the "failure to design and construct" buildings in compliance with the mandated accessibility standards results in liability without regard to intent, knowledge, or even negligence. 42 U.S.C. § 3604(f)(3)(C); see also *United States* v. *Quality Built Constr., Inc.*, 309 F. Supp. 2d 756, 760 (E.D.N.C. 2003) ("Defendants' intent is not relevant to the Court's determination of whether a pattern or practice of discrimination exists."); Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Un-*

der the Fair Housing Act, 40 U. Rich. L. Rev. 753, 772–73 (2006) ("Even if the reason many builders fail to comply with § 3604(f)(3)(C) is good faith ignorance of its mandates, it is clear that such ignorance is not a sufficient legal excuse to avoid liability for violating this provision. * * * [A] defendant's state of mind is simply not relevant to the liability issue in § 3604(f)(3)(C) cases, and in particular, a showing that the defendant was motivated by discriminatory intent is not required in such cases.").

The statute is silent as to who is liable for design and construction violations, but lower courts have held that "any entity who contributes to a violation of the FHAA would be liable." See, *e.g.*, *Baltimore Neighborhoods, Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998); see also *Montana Fair Housing, Inc.* v. *American Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1069 (D. Mont. 1999) (endorsing the approach of *Baltimore Neighborhoods* and applying the "design and construct" requirement to architects, builders, and owners); *United States* v. *Days Inns of Am., Inc.*, 997 F. Supp. 1080, 1083 (C.D. Ill. 1998) ("'Design and construct' is a broad sweep of liability, [encompassing] architects, builders, and planners."). The statute is also silent on the allocation of responsibility among entities jointly responsible for a covered property. It contains no provision addressing any such allocation as a matter of federal law; nor does it contain a provision expressly preempting state-law methods for allocating responsibility (such as contractual provisions or causes of action for indemnity or professional negligence). See App., *infra*, 29a.

2. Congress enacted the Americans with Disabilities Act of 1990 with the express purposes of (1) pro-

viding "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"; (2) developing "clear, strong, consistent, enforceable standards addressing discrimination"; (3) ensuring that the "Federal Government plays a central role in enforcing the standards"; and (4) invoking "the sweep of congressional authority." 42 U.S.C. § 12101(b). To these ends, the ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. 42 U.S.C. §§ 12101 *et seq.*

In particular, Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability * * * by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The statute requires private businesses that serve the public to follow specific architectural standards in new construction and in the alteration of existing buildings, and to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination. See 42 U.S.C. §§ 12182, 12183.[1]

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[1] The lower courts are divided over whether 42 U.S.C. § 12183 applies directly to architects. Compare *Lonberg* v. *Sanborn Theaters Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001) ("[O]nly an owner, lessee, lessor, or operator of a noncompliant public accommodation can be liable under Title III of the ADA for the 'design and construct' discrimination described in § 12183(a)."), with *United States* v. *Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1268 (D. Minn. 1997) ("[A]rchitects are not excluded from liability under the ADA as a matter of law."), and *Johanson* v. *Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1177–78 (S. D. Fla. 1997) (same). That split is irrelevant to the question presented here, however, which involves only state-law claims for indemnification.

As relevant to this case, the rental offices in multifamily rental housing developments qualify as "public accommodations" under 28 C.F.R. § 36.104 because they serve as "sales or rental establishment[s]." Therefore, a developer such as Archstone may be found to have violated the ADA if it "discriminates" in the accessibility of its rental offices under the terms of the statute. The ADA defines such "discrimination" to include "a failure to design and construct facilities * * * that are readily accessible to and usable by individuals with disabilities," without regard to knowledge or fault. 42 U.S.C. § 12183(a)(1); see also 42 U.S.C. § 12188(b)(5) (noting that "good faith effort" to comply with ADA's mandates is relevant only with respect to the amount of civil penalties awarded in Attorney General enforcement actions). The ADA also empowers any person who experiences discrimination under § 12183(a) to seek an injunction requiring the alteration of facilities. 42 U.S.C. § 12188(a).

As with the FHA, the statutory text of the ADA contains no provision authorizing allocation of responsibility as a matter of federal law; nor does it contain any provision expressly preempting state-law methods for allocation of responsibility such as breach of contract, indemnity, or professional-negligence actions. The Department of Justice (DOJ), however, is statutorily responsible for implementing Title III of the ADA,[2] and has promulgated a regula-

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[2] The ADA allocates responsibility for promulgating implementing regulations to multiple agencies. The Equal Employment Opportunity Commission, for example, is responsible for promulgating regulations under Title I (42 U.S.C. § 12116); the Secretary of Transportation is responsible for implementing the transportation provisions (42 U.S.C. § 12186(a)); and DOJ is re-

tion addressing state-law indemnification provisions within the context of commercial leases. Under the ADA, both the owner of a commercial building (such as a shopping mall) and a commercial tenant (such as a store within that building) are liable for any violations of the ADA found within that tenant's space. See 28 C.F.R. § 36.201(b) ("Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of [the ADA]."). The DOJ regulation specifies that these parties may contractually allocate responsibility for any violations of the ADA as they see fit. See *ibid.* ("As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.").

B. Factual Background

1. Archstone is a leading developer and owner of multifamily housing projects throughout the United States. In the 1990s, Archstone hired the architecture firm Niles Bolton Associates, Inc. (Niles Bolton), to design a number of apartment buildings on the East Coast. App., *infra*, 3a. The contracts for each development expressly required Niles Bolton to comply with all applicable laws, including federal disability laws such as the FHA and ADA, and to indemnify Archstone against all losses caused by defects in Niles Bolton's designs. *Id.* at 4a.

In 2004, the Equal Rights Center sent "testers" to inspect several Archstone properties, including five buildings designed by Niles Bolton. On the basis

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sponsible for implementing the non-transportation public-accommodation provisions (42 U.S.C. § 12186(b)).

of technical violations found at those properties, plaintiffs filed a lawsuit against Archstone, Niles Bolton, and three other defendants[3] alleging that more than 100 multifamily properties owned by Archstone were not fully compliant with the ADA and FHA. App., *infra*, 17a.

After thoroughly investigating the allegations, Archstone acknowledged technical violations in 71 of the properties identified in the complaint. App., *infra*, 3a. Archstone entered into a consent decree whereby it agreed to retrofit the 71 properties and to pay plaintiffs $1.4 million in damages. *Ibid.* To date, Archstone has spent more than $60 million retrofitting the 71 buildings, including $7.5 million in retrofitting expenses for the 15 properties designed by Niles Bolton. JA 603. Of the $7.5 million in retrofitting expenses at the properties designed by Niles Bolton, approximately $3.8 million in expenses are directly attributable to errors in Niles Bolton's designs. JA 458–77, 603.[4] Although Niles Bolton directly caused these violations, it did not contribute to the settlement payment or offset any of the retrofitting costs. App., *infra*, 3a.

In July 2005, Archstone filed a cross-claim against Niles Bolton to recoup the portion of the

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[3] In addition to Archstone and Niles Bolton, the complaint named an architect, a builder, and a civil engineer as defendants. These entities were not involved in the design or construction of the properties at issue in the cross-claim underlying this petition. JA 300–01.

[4] The $3.8 million figure represents the sum of the remediation expenses for each defect attributable to Niles Bolton. JA 458–77. The figure does not include interest incurred since the filing of the cross-claim at issue in this petition.

damages and retrofitting costs it incurred because Niles Bolton's designs violated the accessibility requirements of the FHA and the ADA. App., *infra*, 3a. The cross-claim pled state-law causes of action for breach of contract, professional negligence, and express and implied indemnification. *Id.* at 3a–4a. Subsequently, Archstone moved to amend the cross-claim by adding a claim for contribution. *Id.* at 5a–6a.[5] Archstone filed a motion for partial summary judgment as to Niles Bolton's liability, and Niles Bolton brought a cross-motion for summary judgment. App., *infra*, 19a.

2. On March 18, 2009, the district court denied Archstone's motion to amend and dismissed Archstone's cross-claims as preempted by the ADA and the FHA. App., *infra*, 16a–38a. Relying heavily upon the reasoning of *Baker, Watts & Co.* v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc)—a case arising under a different statute, which conditions liability on a finding of negligent wrongdoing rather than imposing liability without regard to the defendant's fault—the court found that Archstone's indemnification claims are "antithetical to Congress' purpose in enacting the FHA and the ADA." App., *infra*, 35a. The court also held, without analysis, that Archstone's breach-of-contract and

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[5] Although the lower courts seemed at times confused as to the nature of petitioners' claims, see App., *infra*, 14a–15a, 26a, the theory underlying each of those claims was that Niles Bolton should be liable for those portions of petitioners' costs directly attributable to errors in Niles Bolton's plans (but not for any other violations at the properties designed by Niles Bolton nor for violations at any other property). See, *e.g.*, JA 370–71, 637–38.

negligence claims are preempted as "*de facto* claims for indemnification." *Id.* at 34a.[6]

The Fourth Circuit affirmed. App., *infra*, 1a–15a. Specifically, the court of appeals held that "[i]n finding Archstone's state-law claims preempted, the district court correctly used the guidance [the Fourth Circuit had previously] set forth in *Baker, Watts*." *Id.* at 8a. The court reasoned that "the regulatory purposes of the FHA and ADA would be undermined by allowing a claim for indemnity" because contractual indemnity "diminishes [an owner's] incentive to ensure compliance with discrimination laws." *Id.* at 10a. The court also opined that, if a developer could be indemnified for violations despite a non-delegable duty to comply with the FHA and ADA, "the developer will not be accountable for discriminatory practices in building apartment housing." *Ibid.* Finally, the court held that "Archstone's state-law breach of contract and negligence claims [are] *de facto* indemnification claims and, thus, preempted." *Id.* at 10a–11a.

REASONS FOR GRANTING THE PETITION

Review is warranted for three separate and compelling reasons. First, this case deepens an intractable conflict among the lower courts regarding the availability of state-law indemnification remedies for violations of strict-liability federal laws where the federal law neither expressly provides for indemnification nor expressly preempts state-law indemnifica-

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[6] The district court also denied Archstone's motion to amend to add a contribution claim on the grounds that amendment would be both futile and prejudicial. See App., *infra*, 26a–27a. The merits of that determination are irrelevant for the purposes of this petition because Archstone does not seek further review of the denial.

tion actions. See Part A, *infra*. Second, in addition to aggravating this circuit split, the Fourth Circuit's decision is plainly wrong, and is fundamentally inconsistent with this Court's preemption jurisprudence. See Part B, *infra*. Third, the Fourth Circuit's decision undermines the goals of the FHA and ADA, uproots settled expectations in the housing industry, and calls into question cross-industry standard practices of indemnity and insurance. See Part C, *infra*. Because this case presents an ideal vehicle for resolving a question of exceptional practical importance, this Court's review is warranted.

A. The Holding Below Exacerbates A Circuit Split Over When Federal Statutes Preempt State-Law Indemnification Remedies.

The lower courts are irreconcilably divided over the question whether a no-fault federal statutory scheme that contains no express preemption provision impliedly preempts state-law claims for indemnification.[7] The Fourth Circuit held in this case that such statutes preempt state-law indemnification claims when the federal statute is "'regulatory rather than compensatory.'" App., *infra*, 9a. The Tenth Circuit agrees. See *Martin* v. *Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992). By contrast, the Sixth, Eleventh, and Federal Circuits and the Su-

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[7] State law claims for indemnity arise under either contractual indemnity agreements or state laws that impose a duty of indemnity regardless of contract. See, *e.g.*, *Herrero* v. *Atkinson*, 38 Cal. Rptr. 490, 492-93 (Cal. Ct. App. 1964). Whether a particular indemnity action proceeds under contract or common law is irrelevant to the preemption question presented here. Indeed, the Fourth Circuit did not distinguish between express and implied indemnity claims in its analysis. See App., *infra*, 10a.

preme Court of Minnesota have concluded that when a federal statutory scheme does not require a finding of culpability (that is, when the defendant need not be adjudged a "wrongdoer" to be liable under the statute), indemnification does not offend any federal policy and therefore is not impliedly preempted.

As a result of this intractable conflict, certain courts across the Nation are striking down contractual indemnity clauses that other courts are upholding. This Court's review is necessary to resolve the confusion among the lower courts and to restore uniformity to federal preemption law in this setting.

1. To place this circuit split in context, it is easiest to start with a set of cases that address preemption in a related but distinct arena. A number of lower courts have held—rightly or wrongly—that federal statutes that are designed to punish *culpable* conduct, but that are silent as to whether the defendant may be indemnified for liability under that statute, impliedly preempt state-law indemnification actions.[8] That was the Fourth Circuit's holding in *Baker, Watts*, for example, on which the court then relied here.

In *Baker, Watts*, the Fourth Circuit held that § 12(2) of the Securities Act of 1933, Pub. L. No. 7322, 48 Stat. 74, which imposes a "reasonable care" standard on sellers of securities (15 U.S.C. § 77l), preempts state-law indemnification clauses because they would effectively override the Act's reasonable-care requirement. 876 F.2d at 1105. The court ex-

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[8] These cases are probably inconsistent with the presumption against preemption, see page 25, *infra*, but the Court would not need to address these cases to resolve the question presented here.

plained that "a right of action for indemnification" in this context "would frustrate the statute's goal of encouraging diligence and *discouraging negligence* in securities transactions." *Ibid.* (emphasis added). Thus, the court concluded, a securities-law "wrongdoer" may not "shift its entire responsibility for federal violations on the basis of a collateral state action for indemnification" because doing so "would frustrate the basic enforcement of federal securities law." *Id.* at 1108; see also, *e.g.*, *Eichenholtz* v. *Brennan*, 52 F.3d 478, 483–85 (3d Cir. 1995) (same); *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1232 (9th Cir. 1989) (same); *Johnson* v. *Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (similar in the context of ERISA fiduciary liability).

The question presented here is distinct from that presented in *Baker, Watts* and similar cases: whether federal *strict-liability* statutes—that is, federal statutes that impose liability for statutory violations regardless of the culpability of the regulated party—preempt state-law indemnification actions. The lower courts are deeply divided on this issue.

2. As we have explained, a violation of the ADA requires merely that a defendant fail "to design and construct facilities * * * that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1). Similarly, a violation of the FHA takes place when a defendant "fail[s] to design and construct those dwellings in such a manner" that they are accessible to individuals with disabilities. 42 U.S.C. § 3604(f)(3)(c). As strict-liability laws, neither of these statutes requires that a defendant have acted negligently, recklessly, or deliberately wrongfully before imposing liability. Thus, these statutes are not designed to punish actors for their *wrong-*

doing; they are instead designed to provide for "fair housing throughout the United States" (42 U.S.C. § 3601), regardless of fault.

In finding petitioners' claims here preempted, the court below extended its prior holding in *Baker, Watts*, which specifically relied on the defendant's negligence, to statutes that do not require culpability. The court reasoned that indemnification "represent[s] an obstacle" to the implementation of *every* federal law (App., *infra*, 9a), so long as the "goals" of the federal law are "regulatory" (when Congress intends to "prevent[]" certain conduct) rather than "compensatory" (when Congress intends only to provide a "remed[y]" for past harms). *Ibid.* Because indemnification "diminishes [a party's] incentive to ensure compliance" with a "regulatory" law, in other words, no party in the Fourth Circuit may ever seek indemnification for violations of such laws, regardless of whether that statute requires a finding of culpable wrongdoing. *Id.* at 10a. Because virtually every federal statute is in some sense intended to prevent certain conduct rather than merely to remedy the negative effects of that conduct—parties in the Fourth Circuit are now effectively prohibited from seeking state-law indemnification for alleged violations of essentially any federal law.

3. The Fourth Circuit is not alone in holding that no-fault federal statutes preempt state-law indemnification claims. In *Martin* v. *Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992), for example, the Tenth Circuit considered implied conflict preemption under the Fair Labor Standards Act (FLSA), which, like the ADA and FHA, is a no-fault statute that is silent on preemption. The defendant, a child-care service provider, had committed "several overtime

[pay] violations" and raised third-party indemnification claims against its day-care-center supervisors, who it asserted were responsible for the violations. *Id.* at 1406; see also *Brock* v. *Gingerbread House, Inc.*, 907 F.2d 115, 116 (10th Cir. 1989) (recounting the case history).

The Tenth Circuit held the indemnification claims preempted. Employing the same reasoning as the Fourth Circuit here, the court concluded that Congress's "intent to provide minimum standards in the work place would not be served by allowing a state cause of action for indemnity," because "an employer who believed that any violation of the provisions could be recovered" under an indemnity agreement "would have a diminished incentive to comply with the statute." *Martin*, 977 F.2d at 1407 (internal quotation marks and alterations omitted). Because "[i]ndemnity actions against employees work against the purposes of the FLSA," the court held, "[t]he conflict between the purposes of federal law and a state cause of action require the latter to yield." *Id.* at 1407–08.

Accordingly, petitioners would have obtained the same result if they had litigated their indemnity claims in the Tenth Circuit. Indeed, the rationale underlying the decision below—that indemnification "diminishes [a party's] incentive to ensure compliance" with any "regulatory" or "preventative" law (App., *infra*, 9a–10a)—mirrors perfectly the Tenth Circuit's approach in *Martin*. At bottom, the Tenth Circuit, like the Fourth, has determined that a federal law that is silent on preemption may nevertheless preempt state-law indemnity claims, entirely apart from any conflict with a statutory requirement that only culpable wrongdoers be liable, because (in

those courts' views) indemnity agreements categorically discourage compliance with the law.

4. The decisions of the Fourth and Tenth Circuits cannot be squared with holdings of the Sixth, Eleventh, and Federal Circuits and the Supreme Court of Minnesota, each of which has concluded that the *sine qua non* for implied federal preemption of state-law indemnification claims is a conflict with an express federal requirement of culpability.[9] If the parties had litigated their dispute in any of these other jurisdictions, petitioners' indemnification claims would have been allowed to proceed.

a. The Eleventh Circuit has expressly concluded that state-law indemnification actions are not preempted under a no-fault federal statute. In *Foley* v. *Luster*, 249 F.3d 1281 (11th Cir. 2001), that court addressed whether the Copyright Act preempts indemnity actions between infringers.[10] The case involved a videographer hired to produce a promotional video for a set of related companies. *Id.* at 1284. In

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[9] The decision below is also in direct conflict with the decisions of several state trial courts, which have held that the ADA and FHA do not preempt state-law indemnity claims. See, *e.g.*, *Miami* v. *HDR Eng'g, Inc.*, No. 09-57028 CA 30. (Fla. Cir. Ct. Feb. 12, 2010) (expressly rejecting the district court's holding in this case and concluding that the ADA does not preempt state-law indemnity claims); *Archstone-Smith Trust* v. *Van Tilburg*, No. 08-CV-8351, slip op. at *3 (Colo. Dist. Ct. Nov. 6, 2009) (same with respect to both the FHA and the ADA); *Archstone-Smith Trust* v. *Architects Orange*, No. 37-2008-00092239, slip. op. at 1–2 (Cal. Sup. Ct. June 12, 2009) (same).

[10] The Copyright Act provides that a copyright holder "has the exclusive rights * * * to authorize," among other things, the "reproduc[tion of] the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1). The Act contains no fault element.

producing the video, the videographer used copyrighted songs without permission. *Ibid.* The copyright owners filed suit against both the videographer who made the video and the companies that used it. *Id.* at 1284–85. The defendant companies then filed cross-claims for indemnification against the videographer, who argued that the indemnification claims were preempted. *Id.* at 1285.

The Eleventh Circuit concluded that the indemnification claims were not preempted. The court reasoned that when a federal statute lacks a culpability requirement—and thus when indemnity bears only on "the *allocation of responsibility*" among defendants (*id.* at 1286) without "intrud[ing] upon the * * * rights guaranteed by" or duties owed under the federal law (*id.* at 1288)—preemption is not appropriate. The court concluded that because the Copyright Act is concerned only with "protect[ing] the rights of copyright holders" without regard for the level of culpability of or the apportionment of liability among defendants, the Act does not "govern cases between infringers." *Id.* at 1287. Thus, because "[n]othing in the language of [the Act] explicitly prohibits indemnity suits" (*ibid.*),[11] the Eleventh Circuit held that the companies' indemnity suit could proceed. *Id.* at 1289.

The Eleventh Circuit's decision in *Foley* is in square conflict with the decision below. An action for

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[11] Although the Copyright Act contains a preemption provision (17 U.S.C. § 301(a)), the Eleventh Circuit held that provision "not applicable" and "irrelevant" to the case, and instead "appl[ied] general preemption law to determine whether [the] indemnity case brought pursuant to Florida common law [was] preempted by the Act." *Foley*, 249 F.3d at 1286.

indemnity concerning a violation of the ADA and FHA obviously would not "intrude upon" the duties owed under those laws (*Foley*, 249 F.3d at 1288) because, like the Copyright Act, neither contains a fault element with which indemnification might conflict. Indeed, under both statutes, "a suit for indemnity between defendants * * * is not an obstacle to congressional intent, which was to protect [plaintiffs] in a comprehensive and uniform way." *Id.* at 1287. Petitioners' indemnity action, if allowed to proceed, would instead bear only on "the *allocation of responsibility*" among the defendants. *Id.* at 1286. There is thus little doubt that petitioners would have prevailed in the Eleventh Circuit.

b. The Federal Circuit adopted comparable reasoning when rejecting an argument for implied preemption under the U.S. patent laws. In *Cover* v. *Hydramatic Packing Co.*, 83 F.3d 1390 (Fed. Cir. 1996), a patent holder brought an infringement action against a lighting-fixture manufacturer that directly violated a patent and an insulation manufacturer that contributed to the infringement. *Id.* at 1391. The insulation manufacturer then filed a cross-claim for indemnification under the theory that it merely manufactured the insulation to the designs and specifications provided by the fixture manufacturer. *Id.* at 1391–92.

The Federal Circuit held that there was "no conflict pre-emption" in this instance because state indemnification law "neither renders compliance with the patent code a 'physical impossibility' nor 'stands as an obstacle to the accomplishment and execution' of the patent laws." *Id.* at 1393. The court reasoned that "patent law defines rights between the patentee and persons who wish to make, use, sell or offer for

sale the patented invention"; it does not require culpability or otherwise concern the eventual allocation of liability among joint infringers. *Ibid.* Thus, because the joint infringers settled with the patentee, "the patentee and the patent code are no longer in the picture" and there can be no conflict with cross-claims for indemnification. *Ibid.*

The Federal Circuit's decision in *Cover*, like the Eleventh Circuit's decision in Foley, cannot be reconciled with the Fourth Circuit's decision below. The ADA and the FHA define the rights and remedies between persons with disabilities and the businesses that own, design or construct noncompliant buildings. 42 U.S.C. §§ 3604, 12183. Once one defendant settles with the plaintiffs with disabilities—as Archstone has done here—the ADA and the FHA are "no longer in the picture." *Cover*, 83 F.3d at 1393. Accordingly, under the Federal Circuit's reasoning, there can be no conflict preemption for cross-claims of indemnification.

c. The Sixth Circuit also recently rejected the argument that a federal law impliedly preempts a state-law indemnity claim, in *Delay* v. *Rosenthal Collins Group, LLC*, 585 F.3d 1003 (6th Cir. 2009). That case addressed whether the indemnification claim of an employee supervisor, Delay, was impliedly preempted under the Commodities Exchange Act (CEA), Pub. L. No. 74-765, 49 Stat. 149 (1936). In the underlying action, the Commodity Futures Trading Commission alleged that Delay had violated several provisions of the CEA by, among other things, failing to "diligently supervise" the handling of commodity interest accounts, in violation of 17 C.F.R. § 166.3. See *Delay* v. *Rosenthal Collins Group, LLC*, No. 2:07-CV-568, 2008 WL 2225717, at *2 (S.D. Ohio May 27,

2008). While the provisions Delay had been accused of violating required a finding of at least negligent wrongdoing, he was exonerated at trial and found not to have violated the applicable standard of care. *Delay*, 585 F.3d at 1004. Delay later sued his employer to recover defense costs, but the district court dismissed the suit as preempted by the CEA. *Ibid.*

The Sixth Circuit reversed, in a decision fundamentally inconsistent with the Fourth Circuit's in this case. According to the Sixth Circuit, a "predicate" to finding a state-law indemnification suit preempted "is that the party seeking indemnification is a 'wrongdoer'" under the purportedly preempting federal law. *Id.* at 1006. Only then would "allowing [a defendant] to enforce a state-law indemnification right * * * frustrate and defeat" the statute's purposes. *Ibid.* (internal quotation marks omitted). But if the party seeking indemnification is *not* a "wrongdoer"—*i.e.*, if he has not been found at fault under the federal law, whether because he has been exonerated or because the relevant statute imposes liability without regard to fault—and if the statute "says nothing about indemnification," then there is "no [federal] policy contrary to an [indemnity] award." *Ibid.* (internal quotation marks omitted). The court accordingly remanded with instructions to permit the indemnity action to proceed. *Id.* at 1007.

Like *Foley* and *Cover*, *Delay* is at loggerheads with the decision below. Because neither the ADA nor the FHA imposes a particular standard of care, parties are held liable under these statutes entirely without regard to culpability. But in the Sixth Circuit, only when the indemnified party is adjudged a "wrongdoer" under federal law would "allowing [it] to enforce a state-law indemnification right * * * fru-

strate and defeat" the federal statute's purposes. 585 F.3d at 1006 (internal quotation marks omitted). It is not enough, therefore, that a law simply be "regulatory" to impliedly preempt an indemnification agreement. The conflict is accordingly clear.

d. The same result would be reached were this case to be litigated in the Minnesota state courts. In *Engvall* v. *Soo Line R.R. Co.*, 632 N.W.2d 560 (Minn. 2001), the Supreme Court of Minnesota concluded that the Locomotive Inspection Act (LIA), Pub. L. No. 103-272, 108 Stat. 745 (1994), did not preempt state-law indemnification claims. Although the cross-defendant in that case apparently framed its argument in terms of field preemption instead of conflict preemption, see 632 N.W.2d at 570–71, the case involved circumstances analytically indistinguishable from those at issue here.

A train engineer was injured while operating a locomotive operated by the Soo Line Railroad Company and manufactured by General Motors. *Id.* at 563. The engineer sued Soo Line under the Federal Employers' Liability Act (FELA) for a violation of the LIA, which imposes, through FELA, certain non-delegable, strict-liability duties on railroads.[12] Soo Line in turn filed a third-party complaint against General Motors seeking contribution and indemnifi-

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[12] The LIA requires that railroads use locomotives that "are in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). A violation of the LIA (which does not itself provide a private right of action) conclusively establishes negligence *per se* for purposes of FELA, regardless of fault. See *Engvall*, 632 N.W.2d at 568 ("[A] railroad employee may use an LIA violation to establish negligence *per se* in a FELA action.")

cation under Minnesota state common law. *Id.* at 563–64.

The trial court dismissed the third-party complaint as preempted by the LIA, but the Supreme Court of Minnesota reversed. The court reasoned that so long as an indemnity action does not "impose" a separate or distinct "standard of care" from that provided under the federal law, there is no inconsistency between an indemnity action and the federal statute. *Id.* at 570–71. And in that case, because the third-party complaint against GM did not involve imposing a conflicting fault standard, "there [was] no danger" that permitting the indemnity action to proceed would "undermin[e] * * * nationwide uniformity" in the enforcement of the LIA. *Id.* at 570–71.[13]

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This disagreement among the lower courts does not rest on differences in the statutory schemes at issue in these cases, or on the specific fact patterns presented to those courts. The nature of the question presented in each case is remarkably consistent. The

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[13] It bears mentioning that in addressing indemnification claims under circumstances similar to those at issue in this case, several other courts have conflated the question whether a federal law *itself* provides for an implied right to indemnification as a matter of federal law (despite the presumption against implied federal rights of action) with the question whether a federal law preempts an independent *state-law* right of indemnification (where the presumption against preemption would counsel in favor of allowing such claims to proceed). See, *e.g.*, *Herman* v. *RSR Sec. Serv. Ltd.*, 172 F.3d 132 (2d Cir. 1999); *United States* v. *Murphy Dev., LLC*, No. 3:08-0960, 2009 WL 3614829, at *2 (M.D. Tenn. Oct. 27, 2009); see also *Delay*, 585 F.3d at 1006–07. The lower courts' repeated conflation of these two issues provides another reason that this Court should grant review to clarify the law concerning the question presented.

divergent results therefore rest solely on the courts' differing legal determinations concerning preemption: in the Fourth and Tenth Circuits' views, on the one hand, a strict-liability federal law that is silent on preemption impliedly preempts state-law indemnity claims because indemnity agreements categorically discourage compliance with "regulatory" laws; in the Sixth, Eleventh, and Federal Circuits' and Minnesota Supreme Court's views, on the other hand, indemnity suits are impliedly preempted only when indemnity would conflict with a statutory purpose of punishing culpable actors. The upshot of the disagreement among the lower courts is clear: whether parties will be indemnified for a violation of federal law turns on nothing more than the jurisdiction in which they litigate their claims. This Court's intervention is accordingly warranted.

B. Review Is Also Warranted Because The Decision Below Is Inconsistent With This Court's Conflict-Preemption Precedents And Is Clearly Incorrect.

The decision below not only exacerbates a circuit split; it is also inconsistent with this Court's conflict-preemption cases and plainly incorrect.

All agree that there is no express-preemption provision in either the FHA or the ADA, and thus that petitioners' state-law indemnification claims are not expressly preempted. Nor has anyone asserted that it would be impossible for the parties to comply with these federal laws while also allocating ultimate responsibility for compliance pursuant to state contract or common law. The lower courts thus found petitioners' state-law claims to be preempted under the doctrine of obstacle preemption. According to the Fourth Circuit, petitioners' state-law claims "stand[]

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." App., *infra*, 8a (quoting *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995), in turn quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

In so holding, the court of appeals ignored the analytic framework that this Court has mandated. But beyond that, the lower court's analysis is incorrect on its own terms.

1. As this Court has repeatedly recognized, conflict-preemption analysis "must be guided by two cornerstones of * * * pre-emption jurisprudence." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Ibid.* (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)). Second, the preemption analysis begins with the presumption against preemption—"'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Ibid.* (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) (internal quotation marks omitted). And as this Court counseled in *Wyeth*, Congress's "silence on [a conflict-preemption] issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" to preempt state-law claims. 129 S. Ct. at 1200.

In determining that petitioners' state-law claims were preempted, the court of appeals in this case did

not even mention the presumption against preemption. Instead—quoting a 22-year-old Fourth Circuit case—the lower court stated that "'[p]reemption under an obstacle preemption theory is more an exercise of policy choices by a court than strict statutory construction.'" App., *infra*, 8a (quoting *Abbot* v. *Am. Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988) (internal alterations omitted). By ignoring this Court's more recent conflict-preemption case law, and in particular the Court's analysis of congressional silence in *Wyeth*, the lower court plainly erred.

2. The lower court's analysis would in any event clearly be wrong even if the presumption against preemption were not applicable here. According to the Fourth Circuit, the "regulatory purposes of the FHA and the ADA would be undermined by allowing a claim for indemnity." App., *infra*, 10a. The court reasoned that indemnity would be inconsistent with an owner's non-delegable duty to comply with the statutes because it would diminish the incentives for compliance by allowing an owner to escape accountability. *Ibid.* This unsupported assumption is plainly incorrect and in any event insufficient to overcome the presumption against preemption.

First, the Fourth Circuit misinterpreted the meaning and scope of Archstone's non-delegable duty to comply with the ADA and FHA. As this Court has explained, actions under discrimination statutes are "in effect, * * * tort action[s]," and "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). Thus, a "non-delegable" duty of compliance does not preclude an owner from assert-

ing indemnification claims; it simply means that an owner cannot escape its vicarious liability to plaintiffs even if it "has * * * done everything that could reasonably be required of" it. *Id.* at 290. (internal quotation marks omitted). While an owner cannot insulate itself against a suit by a plaintiff with a disability, "it is not inconsistent with [the owner's] nondelegable * * * duty to [plaintiffs] for" the architect "to owe a separate but concurrent duty enforceable by" the owner, including in an action for indemnity. *Ellison* v. *Shell Oil Co.*, 882 F.2d 349, 353 (9th Cir. 1989) (allowing a defendant owing a non-delegable duty to bring a state-law claim for partial indemnity in the context of the Federal Employers' Liability Act).

Second, the Fourth Circuit erred in assuming that the availability of indemnity from architects would reduce an owner's or developer's incentive to ensure that its properties comply with federal disability-access rules. Owners retain "a strong incentive to monitor compliance" with the statutes, *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000), because a right of indemnification does not preclude lawsuits by first-party plaintiffs. Indeed, because the obligation to ensure ADA and FHA compliance is non-delegable, plaintiffs have the option of suing any of the participants in the design and construction of a public accommodation. Owners are usually the most expedient target for such lawsuits because in most instances they are readily identifiable, located within the forum, and can be compelled to remediate violations in the buildings they own. Furthermore, if an architect, builder, or other responsible party is judgment-proof, the owner may be saddled with the full cost of remediating the violations. Thus, the availability of a state-law or contractual right of indemnification against architects or

builders does not undercut owners' incentives to ensure that their buildings comply with the ADA and FHA. See, *e.g.*, *Saranillio* v. *Silva*, 889 P.2d 685, 698 (Haw. 1995) (recognizing that "the right of indemnity may be of little value in cases where, for instance, the [indemnitor] is judgment proof."); Helen S. Scott, *Resurrecting Indemnification: Contribution Clauses In Underwriting Agreements*, 61 N.Y.U. L. Rev. 223, 255 (1986) ("even an underwriter who has been completely indemnified has an incentive to investigate issues since he is not protected against an issuer who becomes insolvent before satisfying the judgment").

Third, the Fourth Circuit missed the mark in assuming that indemnity claims undermine the purpose of the ADA and FHA, when in fact they further the congressional purpose of improving accessibility and eliminating discrimination by ensuring that the primary violators are held accountable for designing or constructing inaccessible buildings. Congress could not have intended to allow an architect who caused statutory violations of the FHA or ADA to walk away from the accessibility violations it caused without paying even a dollar to remedy them. See, *e.g.*, *Baltimore Neighborhoods, Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664 (D. Md. 1998) (observing that "allowing [the] architect[] * * * to escape liability" would obstruct the purposes of the FHA). Indeed, the congressional objective of providing "clear, strong, consistent, enforceable standards" can only be achieved if those standards are applicable to all parties in a position to affect compliance. See, *e.g.*, *United States* v. *Tanski*, No. 1:04-CV-714, 2007 WL 1017020, at *22 (N.D.N.Y. Mar. 30, 2007) (noting in the FHA context that the statutory purpose "is best served by imposing broad liability on all those * * *

entities * * * involved in designing and constructing * * * a covered multifamily dwelling").

Thus, there is no demonstrable conflict between indemnity claims and the congressional purposes underlying the ADA and the FHA. Review is warranted because the Fourth Circuit plainly erred by turning the presumption of preemption on its head and presuming preemption in the absence of any evidence of a true conflict.

C. The Issue Here Is Of Substantial Practical Importance.

Proper resolution of the question presented is a matter of exceptional practical importance.

1. The Fourth Circuit's decision, if not reversed by this Court, could drastically reduce the incentives for architects to comply with the ADA and FHA; and it could have a profound effect on the willingness of owners and developers to settle ADA and FHA litigation. If architects can avoid liability for defective architectural designs when the owner settles, their incentives to comply with these statutes will be greatly decreased. *Baltimore Neighborhoods*, 3 F. Supp. 2d at 664. Additionally, the Fourth Circuit's ruling will provide strong disincentives for owners and developers to promptly settle with plaintiffs and remediate violations because by doing so the owners and developers would forfeit any right of recovery against the architects who actually designed the noncompliant plans (or contractors who built a correctly designed property in a noncompliant fashion). Instead, owners and developers may be forced to litigate cases to the bitter end in order to obtain judicial apportionment of liability between the legally responsible parties. See, *e.g.*, Restatement (Third) of

Torts: Apportionment of Liability §§ A18, 23 (2000) (discussing right to apportionment of liability between jointly liable tortfeasors). This result undermines the fundamental purposes of the ADA and the FHA to improve access to persons with disabilities, see pages 3–6, *supra*, by misaligning incentives and introducing unnecessary delays.

2. The Fourth Circuit's decision also calls into doubt the continuing validity of the DOJ regulation that expressly permits owners and commercial tenants to allocate by contract responsibility for ensuring compliance with the ADA. 28 C.F.R. § 36.201(b). In promulgating that regulation, DOJ necessarily concluded that indemnity between defendants is not antithetical to the purposes of the ADA. Courts applying Section 36.201(b) have agreed—they uniformly have held that contractual indemnification in accordance with this regulation is acceptable. See, *e.g.*, *Botosan*, 216 F.3d at 833 (observing that the regulation allows the parties to "allocate responsibility * * * for compliance" as they see fit); *Access4All, Inc.* v. *Trump Int'l Hotel & Tower Condo.*, No. 04-CV-7497, 2007 WL 633951, at *6 (S.D.N.Y. Feb. 26, 2007) (commenting that the right to indemnity under the ADA is "uncontroversial").

Although Section 36.201(b) does not apply to indemnification claims between owners and architects, there is no plausible reason why an owner's indemnity claims against a tenant would be consistent with the ADA while a claim against an architect would create a conflict requiring preemption. In both circumstances, the owner seeks to recover amounts for which it is vicariously liable under the statute. Indeed, Archstone argued below that a finding of implied preemption in this case would constructively

invalidate this DOJ regulation, but the Fourth Circuit rejected this argument in a single footnote without any substantive analysis. App., *infra*, 10a n.1.

3. The practical implications of the broader circuit split identified here extend far beyond the field of multifamily housing. Indeed, the reasoning of the Fourth and Tenth Circuits could be used to invalidate indemnification agreements under almost any federal "regulatory" statute if indemnification could theoretically diminish incentives for compliance. The reasoning could even be extended to invalidate insurance contracts, because there is no plausible basis for distinguishing insurance from other indemnity agreements under the Fourth and Tenth Circuit's reasoning. See, *e.g.*, *Andover Newton Theological Sch., Inc.* v. *Cont'l Cas. Co.*, 930 F.2d 89, 94 (1st Cir. 1991) (upholding insurance coverage of discrimination resulting from a "reckless disregard of federal law"); *Solo Cup Co.* v. *Fed. Ins.* Co., 619 F.2d 1178, 1187 (7th Cir. 1980) (upholding insurance coverage for disparate-impact discrimination claims).The case's importance is compounded by the frequency with which the issue arises. Indemnification provisions are "ubiquitous" in American business (Wallace P. Mullin & Christopher M. Snyder, *Should Firms Be Allowed To Indemnify Their Employees for Sanctions*?, 26 J.L. Econ. & Org. 30, 31 (2010)), influencing virtually every relationship between or among companies doing business together. This is especially so in the circumstances presented here: "Indemnity issues pervade * * * construction law," where "[c]laims of indemnity invariably follow" any loss or liability related to or arising from construction of new facilities like petitioners' apartment buildings. Roger W. Stone & Jeffrey A. Stone, *Indemnity In Iowa Construction Law*, 54 Drake L. Rev. 125, 126

(2005). See also Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 Hastings Women's L.J. 93, 112 (2006) (noting that commercial leases frequently require a tenant to indemnify a landlord for ADA violations caused by that tenant). It thus comes as no surprise that parties frequently litigate state-law indemnification claims in connection with violations of various federal laws.

In addition to the broad scope of cases potentially implicated by the split among the lower courts, the high stakes at issue in many of these cases further increase the need for this Court's intervention. As scholars have documented, "the dollar amounts at stake [in indemnity actions] can be staggering," regularly involving the allocations of millions (sometimes even hundreds of millions) of dollars in damages and costs. Andrew M. Johnston, Amy L. Simmerman, Jeffrey M. Gorris, *Recent Delaware Law Developments in Advancement and Indemnification: An Analytic Guide*, 6 N.Y.U. J. L. & Bus. 81, 82 (2009) (collecting recent cases involving indemnity claims for tens and hundreds of millions of dollars). And it is often unclear who will bear the high costs associated with an indemnity enforcement action. See Earl B. Slavitt & Donna J. Pugh, *Sticks and Bricks, Dollars and Sense: The ADA and Nonresidential Real Estate*, 81 Ill. B.J. 314, 317 (1993) (discussing potential parties to a real-estate transaction who might be liable for high costs when indemnification agreements are used).

Indeed, that is precisely the case here: the cost of bringing all of petitioners' properties into compliance with the ADA and FHA has exceeded $60 million—and the portion directly attributable to Niles Bolton's

designs (and for which petitioners seek recovery) is nearly $3.8 million. Whether petitioners will bear that cost—despite respondent's wrongdoing, and despite respondent's contractual obligation to indemnify petitioners for those costs—turns entirely on the proper resolution of the question presented. This Court's review is thus warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EQUAL RIGHTS CENTER, a not for profit corporation; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, a not for profit corporation; UNITED SPINAL ASSOCIATION, a not for profit corporation,

Plaintiffs,

and

ARCHSTONE MULTIFAMILY SERIES I TRUST; ARCHSTONE,

Defendants-Appellants,

v.

NILES BOLTON ASSOCIATES, a Georgia Corporation,

Defendant-Appellee,

and

CLARK REALTY BUILDERS, LLC, a Maryland Corporation; VIKA INCORPORATED, a Maryland Corporation; MEEKS PARTNERS, f/k/a Kaufman Meeks and Partners, a Texas partnership; NATIONAL MULTI HOUSING COUNCIL,

Defendants.

No. 09-1453

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(1:04-cv-03975-AMD)

Argued: January 27, 2010
Decided: April 19, 2010

Before NIEMEYER, KING, and SHEDD,
Circuit Judges.

Affirmed by published opinion. Judge Shedd wrote the opinion, in which Judge Niemeyer and Judge King joined.

SHEDD, Circuit Judge:

Archstone Multifamily Series I Trust and Archstone (collectively referred to as "Archstone") appeal an order of the district court granting summary judgment in favor of Niles Bolton Associates, Inc. ("Niles Bolton"). Archstone also appeals the district court's denial of its motion to amend its complaint to include a claim for contribution. In granting summary judgment, the court concluded that Archstone's state-law claims are preempted by the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101*et seq.*; in denying the motion to amend, the court concluded that allowing Archstone to amend its complaint would be prejudicial to Niles Bolton and, in any event, futile. For the following reasons, we affirm.

I.

Archstone develops and owns multi-family housing projects throughout the United States. Archstone hired Niles Bolton as its architect to design a number of multi-family apartment buildings on the East Coast in the 1990s. In 2004, the Equal Rights Center and several other disability advocacy groups ("Equal Rights plaintiffs") filed this lawsuit against Archstone, Niles Bolton, various contractors, and other architects used by Archstone, alleging that these entities failed to design and construct 71 apartment buildings so that they would be accessible to persons with disabilities in compliance with the FHA and ADA.

Archstone and the Equal Rights plaintiffs entered into a Consent Decree to settle the lawsuit covering the 71 apartment communities, 15 of which were designed by Niles Bolton. Under the settlement, Archstone was required, *inter alia*, to retrofit the 71 properties to make them compliant with the FHA and ADA and pay the plaintiffs $1.4 million to cover damages, attorneys' fees, and expenses. Archstone has retrofitted a majority of the 71 properties and is in the process of retrofitting the remainder. According to Archstone, the costs of the retrofits at the sites designed by Niles Bolton exceed $2.5 million. Niles Bolton was not a party to the settlement between Archstone and the Equal Rights plaintiffs. However, Niles Bolton later entered into a separate Consent Decree with the Equal Rights plaintiffs that did not include any admission of liability.

Following settlement with the Equal Rights plaintiffs, Archstone filed a cross-claim against Niles Bolton asserting four state-law causes of action: (1) express indemnity; (2) implied indemnity;

(3) breach of contract; and (4) professional negligence. The express indemnity claim focuses on clauses in the contracts between Niles Bolton and Archstone in which Niles Bolton promised to "make good any defects in its services resulting from the failure of the Architect or any of its Consultants to perform their respective services in a manner that is commensurate with the professional standard of care" and to "indemnify" Archstone "from and against all losses, claims, liabilities, injuries, damages and expenses, including attorneys' fees and litigation costs . . . arising out of or resulting from or in connection with, the performance, or failure to perform, by the Architect or its employees." J.A. 37, 51-52. Niles Bolton and Archstone also agreed that "designs or specifications furnished by the Architect found to be negligent will be promptly corrected by the Architect at no cost to the Owner, and the Architect will be responsible to the Owner for all damages, if any, resulting from such defective designs or specifications." J.A. 148. They further agreed that "[a]ny designs or specifications furnished by the Architect which contain errors in coordination of details or dimensional errors will be promptly corrected by the Architect at no cost to the Owner". *Id.*

Archstone's implied indemnity claim rests on the principle that Niles Bolton "bears a substantially greater share of responsibility for any failure of the Properties to be designed according to the requirements of the FHA and the ADA, given Niles Bolton's superior knowledge, skill and involvement in the design of the properties." J.A. 369. The breach of contract claim, as alleged by Archstone, arises because Niles Bolton breached the warranties under its contracts with Archstone by failing to design properties that are in compliance with the FHA and ADA. Fi-

nally, Archstone's professional negligence claim results from Niles Bolton's alleged "failure to exercise the level of professional skill and care required of an architect" to design the properties in question in a manner that conforms to the requirements of the FHA and ADA. J.A. 370. For these state-law causes of action, Archstone sought (1) to recover damages, attorney's fees and costs paid by Archstone to the Equal Rights plaintiffs, (2) to recover costs it incurred retrofitting those portions of the Properties improperly designed by Niles Bolton, and (3) to be indemnified for costs that Archstone will incur to modify the remainder of the properties designed by Niles Bolton that have yet to be retrofitted.

After Archstone filed its cross-claim, the parties conducted discovery for approximately three years. During the course of discovery, Niles Bolton sought to compel Archstone to disclose evidence regarding Archstone's allocation of damages among itself, Niles Bolton, and any other party. Archstone resisted these discovery requests by arguing that it was seeking damages for the 15 of 71 properties that Niles Bolton designed and *all* related settlement amounts, attorneys' fees, and costs paid to the Equal Rights plaintiffs, as well as the costs of retrofitting the 15 properties designed by Niles Bolton. The district court affirmed the magistrate judge's grant of a protective order to Archstone because the allocation of damages was irrelevant to a claim for indemnity. The district court further noted that "there is no suggestion in [the magistrate's discovery rulings] that the court perceived there to be a contribution claim presented by Archstone." *Equal Rights Center v. Archstone Smith Trust, et al.*, 603 F. Supp. 2d 814, 819 (D. Md. 2009).

Three weeks after the close of discovery and on the eve of the deadline for dispositive motions, Archstone filed a motion for leave to amend its cross-claim to include a claim for contribution. Under the amended complaint, Archstone sought to recover contribution on the same grounds as its original claims. In a memorandum order, the district court denied the motion for leave to amend on the ground that it would result in prejudice to Niles Bolton. According to the court, because a claim for contribution requires an analysis of the relative fault of the parties while a claim for indemnification does not, amending the complaint to add this claim would require additional discovery of the type previously rejected by the court because of its view that Archstone was seeking only indemnification rather than contribution. Because Archstone did not move for leave to amend the complaint until after three years of discovery and on the eve of dispositive motions, the court held that the amendment would prejudice Niles Bolton. Further, the court held that even if there were no prejudice, a state-law claim for contribution would be futile because it would be preempted under federal law.

The district court also granted summary judgment in favor of Niles Bolton. The court reasoned that although styled as state-law claims for relief, Archstone's causes of action were indemnity and *de facto* indemnity claims for violations of the FHA and ADA. Because no right to indemnification exists under these laws, and because allowing indemnification on the state-law claims asserted by Archstone would be antithetical to the purposes of the FHA and ADA, the court held that federal law preempted these claims under the doctrine of conflict, or obstacle, preemption.

Archstone timely appealed the grant of summary judgment and the denial of its motion for leave to amend. We address each issue in turn.

II.

A.

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's order granting summary judgment *de novo*. *Jennings v. U.N.C.*, 482 F.3d 686, 694 (4th Cir. 2007) (en banc). Likewise, we also review the district court's preemption determination *de novo*. *AES Sparrow Point LNG, LLC v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008).

Archstone argues that the district court erred because its state-law claims are not antithetical to Congress' purpose in enacting the FHA and ADA. Archstone claims that no conflict or obstacle exists because its cross-claim does not impose requirements that make compliance with federal law impossible. Further, it claims that it only seeks partial indemnity because it seeks to recover only the damages caused by Niles Bolton. Archstone also contends that the court erred in finding its breach of contract and negligence claims are preempted as *de facto* claims for indemnification. Archstone asserts that its claims are not derivative because it is not attempting to enforce the duties that Niles Bolton owed to the Equal Rights plaintiffs, but rather is seeking to enforce the duties Niles Bolton owed to Archstone. Having conducted a *de novo* review of the record, we hold the

district court did not err in finding these claims preempted.

B.

Obstacle preemption applies "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Supreme Court has found state-law claims preempted under obstacle preemption where a state-law claim "interferes with the methods by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) (internal quotation marks and citation omitted). We have explained that

> [a] decision about [obstacle preemption] requires the court independently to consider national interests and their putative conflict with state interests. . . . [P]reemption under [an obstacle preemption] theory is more an exercise of policy choices by a court than strict statutory construction.

Abbot v. Am. Cyanamid Co., 844 F.2d 1108, 1113 (4th Cir. 1988). Obstacle preemption can apply not only to positive enactments of state law but also to state tort claims. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that negligence action against a manufacturer was preempted because it conflicted with a federal agency standard).

In finding Archstone's state-law claims preempted, the district court correctly used the guidance we set forth in *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc). In *Baker, Watts & Co.*, we considered whether the

Securities Exchange Act of 1933 preempted a state-law claim for indemnity. In holding the indemnification claim is preempted, we analyzed whether the claim represented an obstacle to the regulatory goals of the federal law. We explained that "Congress ha[d] not provided a right to indemnification in the federal securities laws under any circumstances." *Id.* at 1108. Furthermore, we emphasized the total nature of a claim for indemnity, concluding that "it would run counter to the basic policy of the federal securities laws to allow a securities wrongdoer . . . to shift its *entire* responsibility for federal violations on the basis of a collateral state action for indemnification." *Id.* (emphasis added). As we explained, "[t]he goal of the 1933 and 1934 Acts is preventive as well as remedial, and 'denying indemnification encourages the reasonable care required by the federal securities provisions.' " *Id.* (internal citations omitted).

We believe this reasoning applies with equal force to an indemnity claim brought under the FHA and ADA. To begin, as with the securities laws at issue in *Baker, Watts & Co.*, the goals of the FHA and ADA are "regulatory rather than compensatory." The principal purpose of the ADA is to "(1) . . . provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). The primary purpose of the FHA is "to provide . . . for fair housing throughout the United States." 42 U.S.C. § 3601. Furthermore, compliance with the ADA and FHA, as conceded by Archstone, is "nondelegable" in that an owner cannot "insulate himself from liability for . . . discrimination in regard to living premises owned by him and ma-

naged for his benefit merely by relinquishing the responsibility for preventing such discrimination to another party." *See Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). Under these principles, it is clear that, like the securities laws at issue in *Baker, Watts & Co.*, the regulatory purposes of the FHA and ADA would be undermined by allowing a claim for indemnity.

Here, Archstone sought to allocate the full risk of loss to Niles Bolton for the apartment buildings at issue. Allowing an owner to completely insulate itself from liability for an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws. If a developer of apartment housing, who concededly has a nondelegable duty to comply with the ADA and FHA, can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices in building apartment housing. Such a result is antithetical to the purposes of the FHA and ADA. Accordingly, we find Archstone's indemnification claims are preempted.[1]

We also hold that the district court correctly held Archstone's state-law breach of contract and negligence claims to be *de facto* indemnification claims

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[1] Archstone argues that because 28 C.F.R. § 36.201(b) permits "allocation of responsibility for complying with the obligations" of the ADA, indemnity is not preempted. We find this argument unpersuasive. The history of this regulation demonstrates that this allocation provision is unique to the landlord-tenant relationship and does not impact the relationships between architects, builders, and other parties. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35555-56 (July 26, 1991).

and, thus, preempted. Our conclusion is buttressed by Archstone's argument in its brief, and repeated at oral argument, that it seeks—regardless of how it labels its claim—to recover 100% of the losses at the 15 sites where Niles Bolton provided architectural services. Such a claim for relief is a *de facto* claim for indemnification derived from violations of these federal statutes. Although Archstone suggests that these claims are not derivative because it only seeks to enforce duties Niles Bolton owes to Archstone, we find that this argument fails because Archstone really seeks to have Niles Bolton pay *all* damages that arise under the FHA and ADA at these sites.

Therefore, we agree with the district court that these *de facto* indemnification state-law claims by Archstone are pre-empted under federal law. *See Baker, Watts & Co.*, 876 F.2d at 1108 (holding that plaintiff's pendent common law actions are pre-empted to the extent that they are *de facto* claims for indemnification). Accordingly, we affirm the district court's grant of summary judgment in favor of Niles Bolton.

III.

We must next decide whether the district court erred by denying Archstone leave to amend its complaint to include a claim for contribution. We review the district court's denial of a motion to amend a complaint under the deferential abuse of discretion standard. *See Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 476 (4th Cir. 2006). Although leave to amend should be "freely give[n] when justice so requires," Fed. R. Civ. P. 15(a)(2), a district court has discretion to deny a motion to amend a complaint, so long as it does not outright refuse "to grant the leave without any justifying reason." *Foman v. Davis*, 371

U.S. 178, 182 (1962). A district court may deny a motion to amend when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the amendment would be futile. *See Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc). Here, the district court gave two bases for denying Archstone's motion to amend—prejudice and futility. Because we believe the district court did not abuse its discretion on at least one of these bases, we affirm.

As to the first basis—prejudice—the district court held that the addition of a contribution claim after the close of a three-year long discovery process and on the eve of the deadline for dispositive motions would have required it to reopen discovery and thereby prejudice Niles Bolton. *See Equal Rights Center*, 603 F. Supp. 2d at 820. In finding that the addition of a claim for contribution would change the character of litigation, the court stated:

> Niles Bolton correctly infers from the proposed claim for contribution that Archstone is essentially admitting liability for some of the violations at the Niles Bolton-designed properties Archstone developed and operates. This admission, according to Niles Bolton, would require further discovery into the nature of each and every alleged violation (under myriad states' laws) to which Archstone is impliedly conceding liability.
>
> In other words, as the case had been framed in the more than three years before the motion to amend was filed, Niles Bolton was alleged, by virtue of the claim for indemnification, to be solely liable under the FHA and the ADA for all of the violations in the com-

plexes it designed. . . . To permit an eleventh hour change in litigation theory to one of partial liability would mean that Niles Bolton has been prejudiced in its ability to assess rationally its exposure to a damages award in favor of Archstone, as its litigation plan did not contemplate such an atomistic battlefield. Furthermore, Niles Bolton's settlement posture would of necessity have been quite different three years ago (before the expenditure of large sums for attorney's fees and litigation expenses) had it known that it was not facing a liability in excess of 15/71 of $1.5 million plus some share of the cost of retrofitting, but something considerably below that amount. . . .

Unquestionably, any reasonable litigant in Niles Bolton's position would have sought specific discovery into how Archstone believed it appropriate to allocate fault for the violations alleged by Plaintiffs, *e.g.*, was Niles Bolton 25% at fault; 35%; 75%? Plainly, in the face of a claim solely for indemnification, no litigant would have been motivated to undertake such discovery, and Niles Bolton has not done so.

Indeed, Niles Bolton attempted in some ways to obtain certain discovery that, indisputably, would have been relevant to a contribution claim but not to an indemnity claim. Archstone resisted such discovery and both Magistrate Judge Gesner (who managed discovery) and I sustained Archstone's objections, each of us on the understanding that Archstone was pursuing *indemnity*.

Id. at 818-819 (emphasis in original).

We hold that the district court did not abuse its discretion in finding the proposed amendment would be unduly prejudicial to Niles Bolton. We find compelling the court's analysis that the amendment—coming so belatedly—would change the nature of the litigation and, would therefore, prejudice Niles Bolton.[2] *See Deasy v. Hill*, 833 F.2d 38, 42 (4th Cir. 1987) (noting that "[b]elated claims which change the character of litigation are not favored").[3]

Archstone argues on appeal that its proposed amendment would not prejudice Niles Bolton because it would not change the character of the litigation. Specifically, Archstone argues that it seeks the same relief that it has sought throughout the litigation and no further discovery would be needed—hence, no prejudice would result for Niles Bolton. *See, e.g.*, Appellant's Br. 50 (arguing that it "seeks the same relief under both its indemnity and

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[2] We need not reach the district court's futility analysis because we find the district court's prejudice analysis is a sufficient basis to affirm the denial of the motion to amend. Accordingly, we do not reach the question of whether a state-law claim for contribution is preempted under federal law.

[3] We have repeatedly affirmed denials of motions to amend which change the character of the litigation late in the proceedings. *See Smith v. Angelone*, 111 F.3d 1126, 1135 (4th Cir. 1997) (holding that given the delay in amending, the late hour of the motion to amend, and the burdens it would impose on the opposing party, the district court did not abuse its discretion in denying the motion to amend); *see also Deasy*, 833 F.2d at 40 (affirming the district court's discretion to deny the motion to amend because of the undue delay and prejudice caused to the opposing party); *Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1035 n. 35 (4th Cir. 1983) (affirming the district court's denial of defendant's motion to amend).

contribution theories"). Indeed, at oral argument, Archstone conceded that its contribution claim would seek to have Niles Bolton cover 100% of the damages at the 15 properties in question. Archstone's position demonstrates a fundamental misunderstanding of the difference between contribution and indemnification. *See Baker, Watts & Co.*, 876 F.2d at 1103 (noting that "[i]ndemnification, of course, involves shifting the entire loss from one wrongdoer to another; contribution requires each wrongdoer to pay his proportionate—or *pro rata*—share of the adverse judgment"). As presented on appeal, the claim which Archstone presents in its amended complaint is a *de facto* indemnification claim, and such a claim is preempted under federal law. Therefore, allowing Archstone to amend under these circumstances to include a so-called contribution claim is, in any event, futile. Accordingly, we affirm the district court's denial of the motion to amend.[4]

IV.

For the foregoing reasons, we affirm both the district court's grant of summary judgment in favor of Niles Bolton and its denial of Archstone's motion to amend its complaint.

AFFIRMED

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[4] At oral argument, there was discussion concerning whether the district court abused its discretion in denying this amendment because the original complaint included the word "contribution" in one of the counts. However, any such argument has been waived because it was not raised in Archstone's opening brief. *See United States v. Jones*, 308 F.3d 425, 427 n.1 (4th Cir. 2002) (holding that an argument not raised in the opening brief is waived).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

EQUAL RIGHTS CENTER, et al.,

Plaintiffs

v.

ARCHSTONE SMITH TRUST, et al.,

Defendant/Cross-Plaintiffs

v.

NILES BOLTON ASSOS., INC.,

Defendant/Cross-Defendant.

Civil Action No. AMD 04-3975.

March 18, 2009.

MEMORANDUM OPINION

ANDRE M. DAVIS, District Judge.

Plaintiffs (The Equal Rights Center ("ERC")), the American Association of People with Disabilities, and the United Spinal Association filed this action against Defendants Archstone Smith Trust and Archstone Operating Trust (together "Archstone"), Niles Bolton Associates, Inc. ("Niles Bolton"), Clark Realty Builders, VIKA, Inc., and Meeks + Partners (collectively "Defendants"), for violations of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619, and the Ameri-

cans with Disabilities Act, 42 U.S.C. § 12181 ("ADA"). Plaintiffs alleged that more than 100 Archstone multi-family properties around the nation were non-compliant with those federal statutes insofar as the properties were designed, constructed, and maintained in a manner that failed to render them fully accessible to disabled and handicapped persons. Niles Bolton provided architectural services for 15 of these properties.

On June 9, 2005, this court issued a Consent Decree detailing a settlement agreement reached by Archstone with Plaintiffs. Plaintiffs eventually reached settlement agreements with all Defendants, including Niles Bolton, and additional Consent Decrees were approved and entered by the court.

The serial settlement agreements and resulting Consent Decrees have disposed of all claims and cross-claims save Archstone's state-law cross-claim against Niles Bolton. Discovery as to the cross-claim has concluded and now before the court are the following motions: (1) Archstone's motion to amend its cross claim; (2) the parties' cross-motions for summary judgment; and (3) Niles Bolton's motion to exclude Archstone's expert opinion testimony. All the motions have been fully briefed and a hearing was held on February 12, 2009. For the reasons set forth within, I shall deny the belated motion to amend the cross-claim. Furthermore, consonant with emergent legal principles, I am persuaded that Archstone's cross-claim for indemnity conflicts with federal law and must be dismissed with prejudice.

I.

Plaintiffs are nonprofit membership organizations that further the interests of persons with dis-

abilities. On December 20, 2004, they filed suit against Defendants alleging violations of the FHA and the ADA. Collectively, Defendants design, develop, construct, and operate apartment complexes throughout the country. The apartment complexes at issue are located in Maryland, Arizona, California, Colorado, Florida, Georgia, Illinois, Massachusetts, New Mexico, North Carolina, New Jersey, New York, Oregon, Tennessee, Texas, Virginia, Washington, and the District of Columbia. The remaining parties are Archstone, a real estate developer, and Niles Bolton, one of the architectural services design firms with which Archstone's predecessors contracted.

As mentioned above, in June 2005, Archstone and Plaintiffs entered into a settlement agreement, which was incorporated into a Consent Decree. The Consent Decree provided, *inter alia*, that Archstone would (1) pay to Plaintiffs $1.4 million in damages, attorney's fees, costs and other expenses and (2) survey and retrofit a total of 71 properties to bring them into compliance with the requirements of the FHA and the ADA. Fifteen of the 71 properties described in the Consent Decree were designed for Archstone's predecessor by Niles Bolton.

On July 1, 2005, Archstone filed a cross-claim for indemnity against Niles Bolton seeking to recover (1) the portion of the $1.4 million settlement payment to Plaintiffs attributable to Niles Bolton's designs; (2) the costs of retrofitting the Niles Bolton-designed properties encompassed by the Consent Decree; and (3) a portion of the attorney's fees Archstone has incurred in defending against Plaintiffs' claims and in seeking relief from Niles Bolton. Archstone's cross-claim relates to the following 15 properties: Governor's Green in Maryland; Reston Landing,

Springfield Station, Stoneridge, Woodland Park, and Worldgate in Virginia; Archstone Matthews, Olde Apex (a/k/a Cameron Woods) and Archstone Preston (a/k/a Cameron Chase) in North Carolina; Barrett Creek, Cameron Landing, State Bridge, and North Point in Georgia; Rocky Creek in Florida; and Hickory Hollow in Tennessee.

Archstone's cross-claim against Niles Bolton relies on the following legal theories, each set forth in a separate count: (1) contractual indemnity; (2) implied indemnity; (3) breach of contract; and (4) professional negligence. Each of these theories rests on the law of one of the following states: (1) the state in which a particular contract was formed; (2) the state selected by a contractual choice-of-law provision; (3) the state where the property is located; and/or (4) Georgia, where Niles Bolton is headquartered. Archstone elaborates that it is "seeking damages only for those violations [of the FHA] that occurred because NBA specified an incorrect dimension or other detail in its construction documents, or otherwise failed to provide sufficient information for the builder to construct the project in accordance with the applicable accessibility requirements." *See* Archstone's Mem. in Supp. of Mot. Summ. J. at 5 (brackets added).

In October 2008, after more than three years of litigation, Archstone moved to amend its cross-claim, *inter alia*, to assert a claim for contribution. Archstone also moved for summary judgment on the issue of Niles Bolton's liability for failure to design FHA-compliant housing, arguing that only damages issues should require trial.

Niles Bolton has filed a cross-motion for summary judgment on all counts. Niles Bolton principally argues that, as a matter of settled principles of

federal law, Archstone cannot seek, under state law, indemnification (or contribution), regardless of the state law legal theory employed. In the alternative, Niles Bolton argues that the state law claims are (1) barred by limitations; (2) barred because Archstone's settlement with Plaintiffs was an unreasonable but voluntary assumption of liability which it could have and would have avoided by defending itself in this action; (3) fatally undermined because, *inter alia*, Archstone has failed to project expert opinion evidence sufficient to sustain its burden to establish the applicable standard of care and any breach of professional duty. Finally, Niles Bolton argues that as a matter of law, it must prevail on the merits of the cross-claim. (Niles Bolton has filed a separate motion seeking to exclude Archstone's expert opinion testimony.)

In the view I take of the case, I need only reach the first issue presented by Niles Bolton's motion for summary judgment, preemption.

II.

Under Fed. R. Civ. P. 15(a)(2), "[t]he court should freely give leave [to amend pleadings] when justice so requires." The express language of the Rule reflects a tension between two important goals: (1) allowing easy amendment to reflect the changes in a party's position as the case develops, and (2) preventing prejudice to an opposing party who will have difficulty in determining how to present its case if a party is allowed to continuously change its position. The Fourth Circuit has construed Rule 15 liberally. *See, e.g., Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 447 (4th Cir. 2004) ("The language of Federal Rule of Civil Procedure 15(a) has been construed to counsel a liberal reading of its application."). According to the

Fourth Circuit, "leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Here, Niles Bolton opposes Archstone's motion for leave to amend its cross-claim. Niles Bolton argues that allowing Archstone to amend the cross-claim to include a claim for contribution will be (1) prejudicial, as Niles Bolton would have to conduct further discovery; and (2) futile, because federal law precludes a right to contribution under the FHA and the ADA. I will consider these issues in turn.

Prejudice

Whether an amendment would be prejudicial is a factual determination. *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006). Courts look at the nature of the proposed amendment, the purpose of the amendment, and the time when the amendment was filed. *Id.* For example, a prejudicial amendment "raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party [and is] offered shortly before or during trial." *Johnson*, 785 F.2d at 509 (citing *Roberts v. Arizona Board of Regents*, 661 F.2d 796, 798 (9th Cir. 1981); *Lyons v. Board of Ed. of Charleston*, 523 F.2d 340, 348 (8th Cir. 1975); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 873 (6th Cir. 1973)). Courts disfavor belated claims that change the character of litigation. *Deasy v. Hill*, 833 F.2d 38, 42 (4th Cir. 1987) (affirming the denial of leave to amend a complaint on the eve of trial to include a claim for negligent performance of a pap smear

where the original complaint in a suit for medical malpractice alleged, in part, a negligent failure to disclose the results of the pap smear). On the other hand, an amendment that simply adds an additional theory of recovery based on the same set of alleged facts offered before discovery has begun is not prejudicial. *Laber*, 438 F.3d at 427.

Niles Bolton argues that if Archstone's motion were granted, it would be prejudiced because litigating a claim of contribution would require additional discovery. The court is constrained to endorse this contention. Niles Bolton correctly infers from the proposed claim for contribution that Archstone is essentially admitting liability for some of the violations at the Niles Bolton-designed properties Archstone developed and operates. This admission, according to Niles Bolton, would require further discovery into the nature of each and every alleged violation (under myriad states' laws) to which Archstone is impliedly conceding liability.

In other words, as the case had been framed in the more than three years before the motion to amend was filed, Niles Bolton was alleged, by virtue of the claim for indemnification, to be *solely liable* under the FHA and the ADA for *all* of the violations in the complexes it designed. *See Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1103 (4th Cir. 1989) (en banc) ("Indemnification, of course, involves shifting the entire loss from one wrongdoer to another; contribution requires each wrongdoer pay his proportionate-or *pro rata*-share of the adverse judgment.").

To permit an eleventh hour change in litigation theory to one of *partial liability* would mean that Niles Bolton has been prejudiced in its ability to as-

sess rationally its exposure to a damages award in favor of Archstone, as its litigation plan did not contemplate such an atomistic battlefield. Furthermore, Niles Bolton's settlement posture would of necessity have been quite different three years ago (before the expenditure of large sums for attorney's fees and litigation expenses) had it known that it was not facing a liability in excess of 15/71 of $1.5 million plus some share of the cost of retrofitting, but something considerably below that amount. (The numerator of the fraction is the total of Niles Bolton-designed properties and the denominator is the total number of properties requiring modifications identified in the Consent Decree stipulated by Plaintiffs and Archstone.)

Unquestionably, any reasonable litigant in Niles Bolton's position would have sought specific discovery into how Archstone believed it appropriate to allocate fault for the violations alleged by Plaintiffs, e.g., was Niles Bolton 25% at fault; 35%; 75%? Plainly, in the face of a claim solely for indemnification, no litigant would have been motivated to undertake such discovery, and Niles Bolton has not done so.

Indeed, Niles Bolton attempted in some ways to obtain certain discovery that, indisputably, would have been relevant to a contribution claim but not to an indemnity claim. Archstone resisted such discovery and both Magistrate Judge Gesner (who managed discovery) and I sustained Archstone's objections, each of us on the understanding that Archstone was pursuing *indemnity*. As Judge Gesner reasoned, in part, in granting a protective order to Archstone:

> First, several of the "issues" raised by [Niles Bolton] as to why the settlement doc-

> uments are relevant relate to how Archstone is allocating the $1.4 million settlement it paid to plaintiffs across the 71 properties subject to the settlement. Archstone responds that it is merely allocating 21% of that sum to [Niles Bolton] because [Niles Bolton] designed 15 of the 71 properties, (i.e., 21% of the total), and that [Archstone and Plaintiffs] did not agree on a damage figure for any particular property or for any particular type of violation.... Based upon this representation, the court cannot envision how the settlement documents will yield admissible evidence.

See Feb. 8, 2008, Order Granting Motion for Protective Order, p. 5 (Docket No. 145); *see also* this court's Order overruling Niles Bolton's objections to Judge Gesner's grant of the protective order:

> Niles [Bolton]'s emphasis that because Archstone's claim is one for *indemnity* arising out of a *settlement agreement* with plaintiffs the "reasonableness" of the settlement has primacy here is misguided, as Judge Gesner clearly recognized. Niles [Bolton] is not an insurer; the claim for indemnity under the circumstances here is much more akin to an original action for professional malfeasance. Manifestly, to succeed on its indemnity claim, Archstone will have to show the elements of such a claim; the details of settlement negotiations between the settling parties are of no consequence to the remaining, genuine issues in this case. Niles [Bolton's] keen interest in, indeed, its seeming obsession with, the settlement process, while un-

> derstandable, perhaps, is quite beside the point.

June 12, 2008, Order Overruling Objections to Order of Magistrate Judge, pp. 1-2 (Docket No. 160). As can be seen, there is no suggestion in these rulings that the court perceived there to be a contribution claim presented by Archstone.

Although no trial date had been assigned when the motion to amend was filed in October 2008, the close of the three-year discovery period was at hand and the due date for dispositive motions was looming large. While delay alone will not justify denial of a motion to amend, "[a] party who delays in seeking an amendment is acting contrary to the spirit of the rule." *Deasy*, 833 F.2d at 41 (internal quotation omitted).

Archstone argues that Niles Bolton's contention that it will be prejudiced by the amendment should be rejected because Niles Bolton had adequate notice of Archstone's intent to assert a claim for contribution. As support for this assertion, Archstone relies solely on the following allegation in Count IV (labeled "Negligence") of its cross-claim: "Niles Bolton is liable to Archstone for contribution of a portion of (i) the damages, attorney's fees and costs paid by Archstone to the Plaintiffs, and (ii) costs incurred by Archstone to modify and retrofit noncompliant portions of the Properties designed by Niles Bolton." Cross-claim, ¶ 29. I reject Archstone's contention that this lone statement in its cross-claim was sufficient to give reasonable notice to Niles Bolton of the existence of a claim for contribution.

First, the allegation is ambiguous. In claiming "contribution for a portion," Archstone has not ade-

quately advised Niles Bolton that the damages it seeks in the negligence count is any different from that sought in the other counts. (After all, the essence of the negligence claim is that Niles Bolton is guilty of *negligent breach of contract*.)

Moreover, in its prayer for relief, Archstone specifically failed to seek contribution, alleging, instead, that it sought "[j]udgment in favor of Archstone and against Niles Bolton for the cost of modifying those portions of the Properties designed by Niles Bolton;" and judgment "for the portion of the $1.4 million settlement paid by Archstone to Plaintiffs on account of the design deficiencies in the Properties designed by Niles Bolton;" and finally and most pointedly, "[a] declaration that Niles Bolton is required to indemnify Archstone for all costs that have been incurred or will be incurred by Archstone, in accordance with the Decree, to modify those portions of the Properties designed by Niles Bolton." In short, the cross-claim did not provide reasonable notice to Niles Bolton that not only indemnification, but also contribution, was being sought. *See id.* (disapproving of a party's "[h]inting at a claim"). Clearly, Archstone's decision to file the motion for leave to amend arose exactly because it realized, late in the litigation day, that it had not asserted a claim for contribution.

Accordingly, I find that the proposed amended cross-claim would work real and substantial prejudice to Niles Bolton. In light of the well-settled law surrounding the obvious differences between indemnity, on the one hand, and contribution, on the other hand, *see Baker, Watts & Co.*, 876 F.2d at 1103; *and see* cases discussed *infra*, Archstone's failure to identify a claim for contribution for more than three years of vigorous litigation and contentious discovery

is not excusable. The delay, coupled with the evident prejudice the proposed amendment would visit on Niles Bolton, compels denial of the motion to amend.

Futility

Niles Bolton also contends that the belated addition of a contribution claim would be futile because federal law forecloses a claim for contribution in respect to joint and several liability arising under the FHA and the ADA, with the same force as it precludes a claim for indemnity. As discussed below, I agree that no right to indemnification exists under the FHA or the ADA, and there is no reason to suppose an analysis of a claim for contribution under the circumstances here would yield any different result.

For the reasons explained above, therefore, the motion to amend shall be granted, insofar as Archstone seeks to delete two of the properties it originally identified as Niles Bolton-designed properties, but it shall be denied insofar as Archstone seeks to assert a claim based on the theory of contribution.

III.

Cross motions for summary judgment "do not automatically empower the court to dispense with the determination whether questions of material fact exist." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). The court may grant summary judgment in

favor of one party or deny both motions. *See Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine if, considering all evidence, no reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may affect the outcome of the case. *Id.* "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this initial burden, the non-moving party must set out specific facts showing a genuine issue for trial to avoid summary judgment. Fed. R. Civ. P. 56(e)(2).

IV.

A

Plaintiffs brought first-party claims against Defendants under the FHA and the ADA. Archstone's subsequent cross-claim against Niles Bolton is a derivative claim for indemnity. *See Hepburn v. Athelas Inst., Inc.*, 324 F. Supp. 2d 752, 757 n. 1 (D. Md. 2004) (indemnification and contribution are derivative claims). Thus, it is undisputed that, although Archstone has clothed its claims for relief in the state law garb of breach of contract and professional mal-

practice, all are derivative claims in the sense that they arise *solely* based on Archstone's actual or potential first-party liability under, i.e., its violation of, the FHA and/or the ADA.

It is well-settled, as a matter of federal jurisprudence, that a right of indemnity and/or contribution may be created (1) by Congress, either explicitly or by judicial implication from discovered Congressional intent, or (2) by the Supreme Court in the exercise of its remedial power to fashion a limited federal common law. *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981) (holding that contribution claims were not available to an employer liable, jointly with a labor union, for violations of Title VII of the Civil Rights Act of 1964 and/or the Age Discrimination in Employment Act of 1967). The clear weight of authority among lower courts applying the reasoning of *Northwest Airlines* compels the conclusion that there is no right to indemnification under the FHA or the ADA.

First, no such expressed right exists under those statutes. As for the possibility of an implied right based on one or both of the statutes, the Supreme Court has instructed: "In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction.... The ultimate question in [such] cases ... is whether Congress intended to create the private remedy-for example, a right to contribution-that the plaintiff seeks to invoke." *Id.* at 91. Congressional intent may be inferred from the following factors: the language of the statute itself, the statute's legislative history, the purpose and structure of the statute, and the likelihood that Congress intended to supersede or

to supplement existing state remedies. *Id.* (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

Second, although, in limited circumstances, federal courts have the power to fashion "federal common law," *Northwest Airlines*, 451 U.S. at 95, the Supreme Court has cautioned that "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Id.* The legislative, not the judicial branch, is vested with lawmaking powers. *Id.* "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Id.* at 95 n. 34.

The limited circumstances in which federal courts have the power to fashion federal common law are "few and restricted," as the Supreme Court pointed out in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981):

> There is, of course, "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." *See United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). These instances are "few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964),

> and those in which Congress has given the courts the power to develop substantive law, *Wheeldin v. Wheeler*, *supra*, at 652.

In sum, the unmistakable thrust of Supreme Court precedent is that Congress' selection (and non-selection) of remedies in comprehensive remedial federal statutes, especially anti-discrimination statutes, is not a proper subject with which federal or state courts ought to tinker. *See infra*.

B

Faithful to this mandate, every federal court to have examined the teachings of *Northwest Airlines* and its progeny (including *Texas Industries*, which was decided the same term as *Northwest Airlines*) in the context of the FHA and the ADA has concluded that no claim to indemnity (or contribution) exists in connection with liabilities arising thereunder. *United States v. Quality Built Const., Inc.*, 309 F. Supp. 2d 767 (E.D.N.C.2003), for example, applied the reasoning of *Northwest Airlines* in a case in which the government filed an action against a developer, a builder and an architect for failing to design and build FHA-compliant complexes. *Id.* at 771. The government and the architect resolved the suit by entering into a consent order. *Id.* The builder filed a cross-claim against the architect for indemnification and contribution. *Id.* at 778. The builder also asserted state law claims for breach of contract and breach of the standard of care. *Id.* The architect moved for summary judgment, contending (1) there is no express or implied right to indemnity or contribution under the FHA, (2) there is no federal common law right to indemnification or contribution, and (3) the state law claims for breach of contract and breach of

the standard of care, as *de facto* claims for indemnification and contribution, failed as a matter of law. *Id.*

The court conducted an evaluation of the cross-claim pursuant to the principles laid down in *Northwest Airlines, Id.* at 778-79. The court granted summary judgment to the architect on the claims for indemnification and contribution, as well as on the state law claims "[t]o the extent that Defendants seek indemnification," *Id.* at 779 (*citing Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989), and *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998)), concluding that federal law afforded no claim to relief. The court declined to exercise supplemental jurisdiction over the remaining state law claims and they were dismissed without prejudice. *Id.*

United States v. Gambone Brothers Dev. Co., 2008 WL 4410093 (E.D. Pa. Sept. 25, 2008), a case in which "the relevant facts [were] indistinguishable from [those in *Quality Built Const.*]," *id.* at *4 (alterations added), adopted and elaborated the reasoning in Quality Built Const. and reached the same result. *Accord United States v. Shanrie Co., Inc.*, 2009 WL 455136 (S.D. Ill. Feb. 23, 2009); *see also Bowers v. Nat'l Collegiate Athletic Assoc.*, 346 F.3d 402 (3rd Cir. 2003) (no contribution claim under Title II of the ADA); *Access 4 All, Inc. v. Trump Int'l Hotel & Tower Co.*, 2007 WL 633951, *6 n. 8, 2007 U.S. Dist. LEXIS 13560, *20 n. 8 (S.D.N.Y. Feb. 26, 2007) ("There is no express right to indemnity under the ADA, and the fact that the ADA has a comprehensive remedial scheme and that owners of non-compliant properties are not members of the class that the statute was in-

tended to protect argue against reading any implied right of indemnification into the statute.").

C

Archstone plainly recognizes that federal law affords it no remedy under the circumstances of this case; it makes no argument to the contrary. Rather, as I understand its contentions, it argues that it is entitled to indemnity under *state law*. Archstone's theories can be distilled to two propositions. First, because Niles Bolton had, not simply a statutory duty owed to Plaintiffs, but separate and distinct contractual and professional duties owed to Archstone to ensure its designs complied with the FHA and the ADA, then in the face of a proven breach of those duties, Archstone should have a remedy under state law for (negligent) breach of contract. Second, because most, if not all, of the separate contracts between Archstone and Niles Bolton expressly provide for indemnification for damages arising out of Niles Bolton's failure to perform its agreements, indemnity is therefore available. These contentions are unavailing.

To be sure, Archstone is correct in its assertion that Niles Bolton had an independent obligation to design FHA- and ADA-compliant multi-unit housing. Archstone devotes more than 20 pages in its memorandum in support of the motion for partial summary judgment explaining that Niles Bolton (1) was required to comply with the FHA and ADA, and (2) (allegedly) failed to comply with the requirements of those statutes. As to the former assertion, it is true that Niles Bolton, like Archstone, had a nondelegable duty to design compliant dwellings. Furthermore, as to the latter assertion, Niles Bolton's failure to fulfill its independent obligation under the

federal statutes opens itself up to liability. Manifestly, however, Niles Bolton is, or would be, liable only to Plaintiffs on first-party claims under the FHA and the ADA, claims Plaintiffs properly asserted. *See Baltimore Neighborhoods, Inc.*, 3 F. Supp. 2d at 665 ("In essence, any entity who contributes to a violation of the FHAA would be liable. By this, the Court does not suggest that all participants are jointly and severally liable for the wrongful actions of others regardless of their participation in the wrongdoing, but rather, that those who are wrongful participants are subject to liability for violating the FHAA"). Most assuredly, Niles Bolton is not and would not be liable to Archstone on a derivative indemnification claim based on the FHA or the ADA.

As a matter of law, Archstone's state law claims for breach of contract and professional negligence are wholly derivative of Archstone's primary liability and are therefore what federal law regards as *de facto* claims for indemnification. Accordingly, those state law claims are barred because any recovery by Archstone would frustrate the achievement of Congress' purposes in the FHA and the ADA. To paraphrase the Fourth Circuit: "[A] state action for indemnification would frustrate the basic enforcement of federal [anti-discrimination] law. Plaintiff's [state law statutory] claim for indemnification is therefore preempted and should be dismissed with prejudice. We leave it to the state courts to classify plaintiff's pendent common law actions. If they are *de facto* claims for indemnification, they too are preempted." *Baker, Watts & Co.*, 876 F.2d at 1108 (alterations added); *see Quality Built Const.*, 309 F. Supp. 2d at 779 ("To the extent that Defendants seek indemnification on the basis of these state actions, the claims are not allowed").

In *Baker, Watts & Co.*, on which Archstone heavily relies, the Fourth Circuit did not preclude state law remedies for *contribution* based on a Maryland statute that afforded relief to injured investors bringing first-party claims largely on the same basis as federal securities laws, although the federal claims had been finally adjudicated and complete relief awarded thereunder. *See Baker, Watts & Co.*, 876 F.2d at 1106. The Court reasoned that the plaintiff in that case, which had paid damages in settlement of the first-party claims, may seek contribution based on the state statute (or, perhaps, state common law) unless its claims are preempted by federal law. *Id.* "State law is preempted only when Congress acts to 'occupy the field,' or when the state claims at issue actually conflict with federal law." *Id.* at 1107. As the state securities statute permissibly coexisted with the federal statute, no conflict between the two precluded a claim for contribution based on the state statute, *although indemnification was foreclosed. Id.*

Here, Archstone's sole claim is for indemnification, even those labeled as breach of contract and professional malpractice, and indemnification is antithetical to Congress' purpose in enacting the FHA and the ADA. However labeled, the indemnification claim is preempted by federal law, every bit as much as such a claim is preempted in respect to the federal securities laws under review in *Baker, Watts & Co.* Archstone claims that it "is not seeking, through its implied indemnity claims, to 'shift its entire responsibility for federal violations to Niles Bolton.'" *See* Archstone's Reply Mem. at 29. But by its very definition, that is exactly what indemnity means.

Archstone points to its contracts with Niles Bolton as a basis for indemnification. These contracts

contain express indemnity provisions for losses and damages arising out of Niles Bolton's performance of, or failure to perform, its duties and obligations under the contract. But I must reject this formalism. The Plaintiffs alleged first-party FHA and ADA claims and Archstone's derivative claim for indemnity must first be evaluated under those statutes if the Congressional purposes are to be fully achieved. As the caselaw cited above well shows, both statutes are comprehensive. To illustrate, among the purposes of the ADA are "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(a)(1)-(a)(2). These goals would be undermined if parties could simply "contract around" their responsibilities under the statute. *Cf. Access 4 All, Inc. v. Atlantic Hotel Condominiums Ass'n, Inc.*, 2005 WL 5643878, *13 (S.D. Fla. Nov. 23, 2005) ("[T]he Court cannot approve an arrangement where a developer of a hotel can essentially contract around ADA compliance").

The same imperative of Congressional purpose applies to attempts to "contract around" the "nondelegable" duties imposed by the FHA. The *Gambone* court succinctly summarized why Congress' comprehensive plan to root out disability discrimination in housing in the FHA, as amended, would be seriously undermined if those with primary liability under the FHA could shift the burdens and costs of compliance to others:

> [The court] agree[s] with the holding of *Quality Built* that a defendant that is itself liable under the FHA for handicap discrimi-

> nation is "clearly not among the class which the statute is intended to protect, but rather [is] the part[y] whose conduct the statute was intended to regulate." *Quality Built*, 309 F. Supp. 2d at 778. In passing the statute, Congress created the same type of "comprehensive legislative scheme including an integrated system of procedures for enforcement" that was at issue in *Texas Indus.* and *Northwest* Airlines. Consequently, "the presumption that a remedy was deliberately omitted from a statute is strongest." *Texas Indus.*, 451 U.S. at 645 (quoting *Northwest Airlines*, 451 U.S. at 97). *Congress failed to provide a contribution and indemnity remedy to permit one defendant from asserting joint and several liability against co-defendants. This failure raises the presumption that Congress deliberately intended that each co-defendant have a non-indemnifiable, non-delegable duty to comply with the FHA and to compensate others for its own conduct.*

Gambone Brothers Dev. Co., 2008 WL 4410093, *8 (first two alterations added; emphasis added). Thus, Archstone's express indemnity claim, based on its contract with Niles Bolton, is barred by federal law, every bit as much as its implied indemnity claim is barred.

Notably, the Fourth Circuit has made clear that it "reject[s][the] assertion that the federal policy against indemnification extends only to intentional wrongdoing." *Baker, Watts & Co.*, 876 F.2d at 1108 (alterations added). The robustness of that "federal policy" is such that under the circumstances here, indemnification is forbidden irrespective of the

source of the cross-plaintiff's claimed entitlement to it. *Id.*

V.

For the reasons set forth, Archstone's motion to amend shall be denied as untimely and prejudicial to Niles Bolton. Furthermore, the conclusion is inescapable that Archstone's cross-claim for indemnity is barred by federal law. Accordingly, Niles Bolton's motion for summary judgment shall be granted and Archstone's cross-claim dismissed with prejudice. An Order follows.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

EQUAL RIGHTS CENTER, et al.,

Plaintiffs

ARCHSTONE SMITH TRUST, et al.,

Defendant / Cross-Plaintiffs

v.

NILES BOLTON ASSOS., INC.,

Defendant / Cross-Defendant

Civil Action No. AMD 04-3975

ORDER

In accordance with the foregoing Memorandum Opinion, it is this 18th day of March, 2009, by the United States District Court for the District of Maryland, ORDERED

(1) That the motions to exclude, for partial summary judgment, to strike, and to take judicial notice (Paper Nos. 183, 185, 192, 204, and 221) are DENIED; and it is further ORDERED

(2) That the motion to amend (Paper No. 182) is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED

(3) That the motion for summary judgment (Paper No. 193) is GRANTED AND JUDGMENT IS ENTERED IN FAVOR OF NILES BOLTON ASSO-

CIATES, INC., against ALL CROSS-PLAINTIFFS; and it is further ORDERED

(4) That ALL PRIOR RULINGS MADE HEREIN ARE RECONFIRMED, ALL REMAINING CLAIMS, COUNTERCLAIMS AND CROSS-CLAIMS ARE DISMISSED, AND THIS ORDER CONSTITUTES A FINAL JUDGMENT; and it is further ORDERED

(5) That the Clerk shall CLOSE THIS CASE.

/s/
ANDRE M. DAVIS
United States District Judge

APPENDIX D

Relevant Provisions of the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601 et seq.

42 U.S.C. § 3601. Declaration of Policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 U.S.C. § 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial sta-

tus, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)

(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily ac-

cessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)

(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C),

compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)

(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section

3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means—

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

APPENDIX E

Relevant Provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq.

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex,

national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(9) Redesignated (8)

(b) Purpose It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12182. Prohibition of discrimination by public accommodations

(a) General rule No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that

provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or ac-

commodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, fa-

cilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) **Accessibility** It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) **Equivalent service** If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent

to the level of service provided to individuals without disabilities.

(C) Demand responsive system For purposes of subsection (a) of this section, discrimination includes—

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements For purposes of subsection (a) of this section, discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

42 U.S.C. § 12183. New construction and alterations in public accommodations and commercial facilities

(a) **Application of term** Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after

July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator Subsection (a) of this section shall not be construed to require the installation of an

elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

APPENDIX F

28 C.F.R. § 36.201 General.

(a) **Prohibition of discrimination.** No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.

(b) **Landlord and tenant responsibilities.** Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.

171

No. 10-103

Supreme Court, U.S.
FILED
SEP 20 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ARCHSTONE MULTIFAMILY SERIES I TRUST and ARCHSTONE,
Petitioners,

v.

NILES BOLTON ASSOCIATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Petitioners have presented compelling evidence to grant the Petition, when the Fourth Circuit's opinion, which holds that a party who has violated the Fair Housing Act of 1968 ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, may not seek indemnity under state law for those violations because such claims are preempted, does not conflict with a decision of this Court or another Court of Appeals.

RULE 29.6 STATEMENT

Respondent Niles Bolton Associates, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
A. A Circuit Split Does Not Exist	4
1. Archstone Improperly Frames the Issue	6
2. The Fourth Circuit Correctly Examined the ADA's and FHA's Goals and Purposes	7
3. The Potential Indemnitee's Conduct Is Part of the Court's Evaluation of Whether State-law Claims Conflict with Statutory Goals	10
4. The Copyright Act and Patent Act Cases Have Different Statutory Goals and Purposes That Lead to Different Preemption Results	13
B. The Ruling Below Correctly Applies This Court's Preemption Precedents	18
1. The Presumption Against Preemption Does Not Apply	18
2. The Presumption, Even If Applicable, Is Sufficiently Overcome	23
3. Archstone's Indemnity Claims Are Incompatible With the Goals of the ADA and the FHA	24

TABLE OF CONTENTS—Continued

Page

C. Archstone's Bases For Its Claim of "Substantial Practical Importance" Do Not Justify Review 28

CONCLUSION 31

TABLE OF AUTHORITIES

CASES Page

Abbott v. Am. Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988) 22, 23
Access4All, Inc. v. Trump Int'l Hotel & Tower Condo., No. 04-CV-7497, 2007 WL 633951 (S.D.N.Y. Feb. 26, 2007) 24
Alexander v. Choate, 469 U.S. 287, 296 (1985) 20
Anderson v. Sara Lee Corp., 508 F.3d 181 (4th Cir. 2007) 9
Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc., 168 F.3d 1362 (D.C. Cir. 1999) 23
Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) 16
Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101 (4th Cir. 1989) 11, 12, 17
Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 3 F. Supp. 2d 661 (D. Md. 1998) 27
Bonner v. Union Pac. R.R., No. CV03-134-S-MHW, 2005 WL 1593635 (D. Idaho July 6, 2005) 17
Botosan v. Paul McNally Realty, 216 F.3d 827 (9th Cir. 2000) 29
Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union, 468 U.S. 491 (1984) 22
California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 19
Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) 14
Cover v. Hydramatic Packing Co., Inc., 83 F.3d 1390 (Fed. Cir. 1996) 14, 15

TABLE OF AUTHORITIES—Continued

Page

Delay v. Rosenthal Collins Group, LLC, 585 F.3d 1003 (6th Cir. 2009) 10, 11, 12
Eichenholtz v. Brennan, 52 F.3d 478 (3d Cir. 1995) 12
Ellison v. Shell Oil Co., 882 F.2d 349 (9th Cir. 1989) 26
Engvall v. Soo Line Railroad Co., 632 N.W. 2d 560 (Minn. 2001) 16
Foley v. Luster, 249 F.3d 1281 (11th Cir. 2001) 13, 14
Franklin v. Kaypro Corp., 884 F.2d 1222 (9th Cir. 1989) 12
Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) 6
Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000) 4
Globus v. Law Research Serv., Inc., 418 F.2d 1276 (2d Cir. 1969) 12
Gonzalez v. Oregon, 546 U.S. 243 (2006) 21
Herman v. RSR Security Servs. Ltd., 172 F.3d 132 (2d Cir. 1999) 9
Hines v. Davidowitz, 312 U.S. 52 (1941) 4
International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 6
LeCompte v. Chrysler Credit Corp., 780 F.2d 1260 (5th Cir. 1986) 9, 10
Lyle v. Food Lion, Inc., 954 F.2d 984 (4th Cir. 1992) 9, 10, 12
Martin v. Gingerbread House, Inc., 977 F.2d 1405 (10th Cir. 1992) 8, 9, 14
Mathis v. United Homes, LLC, 607 F. Supp. 2d 411 (E.D.N.Y. 2009) 7, 8, 24

TABLE OF AUTHORITIES—Continued

Page

Mehl v. Canadian Pac. Ry., 417 F. Supp. 2d 1104 (D.N.D. 2006) 17
Meyer v. Holly, 537 U.S. 280 (2003)..... 25
Northwest Airlines v. Transp. Workers, 451 U.S. 77 (1981)..... 8
On Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001), *as amended*, (May 15, 2001)..... 14
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)..... 19
Roth v. I & M Rail Link, LLC, 179 F. Supp. 2d 1054 (S.D.Iowa 2001) 17
Tex. Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981)..... 8
United States v. Gambone Bros. Dev. Co., No. 06-1386, 2008 WL 4410093 (E.D. Pa. September 25, 2008) 7
United States v. Locke, 529 U.S. 89 (2000).. 19
United States v. Murphy Development, LLC, No. 3:08-0960, 2009 WL 3614829 (M.D. Tenn. Oct. 27, 2009) 24
United States v. Quality Built Constr., Inc., 309 F. Supp. 2d 767 (E.D.N.C. 2003)..... 7
United States v. Shanrie Co., Inc., 610 F. Supp. 2d 958 (S.D. Ill. 2009)..... 7
United States v. Shanrie Co., Inc., No. 05-306-DRH, 2007 WL 980418 (S.D. Ill. March 30, 2007) 27
Wyeth v. Levine, 129 S.Ct. 1187 (2009)..... 18, 20, 21, 22

STATUTES

7 U.S.C. § 1, *et seq.* 11

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 201, *et seq.* 8, 9, 10, 14
42 U.S.C. § 3601, *et seq.* .....*passim*
42 U.S.C. § 3602(f)..... 19
42 U.S.C. § 12101, *et seq.* .....*passim*
42 U.S.C. § 12181(9)..... 29
28 C.F.R. § 36.201(b)..... 28, 30

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. VI, cl. 2..... 22, 23

MISCELLANEOUS

Sup. Ct. R. 10..... 4, 6

IN THE

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ARCHSTONE MULTIFAMILY SERIES I TRUST and ARCHSTONE,
Petitioners,

v.

NILES BOLTON ASSOCIATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners Archstone Multifamily Series I Trust and Archstone (collectively "Archstone") own and develop multifamily housing projects. Archstone Pet. App. 3a. Respondent Niles Bolton Associates, Inc. is an architectural firm that, among other things, designs multi-family dwellings. *Id.* Niles Bolton entered into design agreements with Archstone to provide professional design services for a number of multi-family apartment buildings that are at issue in this case. *Id.* These apartment buildings are in Maryland, Virginia, North Carolina, Georgia,

Florida, and Tennessee. Archstone Pet. App. 18a-19a. In 2004, the Equal Rights Center and other advocacy groups filed an action against Archstone and Niles Bolton alleging violations of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* Archstone Pet. App. 3a. In June 2005, Archstone voluntarily entered into a settlement with the plaintiffs, which was incorporated into a Consent Decree. *Id.* at 17a. The Consent Decree provided that Archstone would (i) pay plaintiffs $1.4 million in damages, (ii) pay all attorneys' fees, costs and other expenses incurred by it and plaintiffs, and (iii) retrofit 71 properties to remedy alleged noncompliance with the FHA and ADA. Niles Bolton provided architectural design services for 15 of these 71 properties. *Id.* at 3a. Niles Bolton subsequently entered into a separate Consent Decree with the plaintiffs that resolved its first party liability under the ADA and FHA as between them, but did not include an admission of liability. *Id.*

After settling with the plaintiffs, Archstone filed a cross-claim against Niles Bolton. *Id.* This cross-claim asserted the following theories of recovery in separate counts: (1) contract indemnity; (2) implied indemnity; (3) breach of contract; and (4) professional negligence. *Id.* at 3a-4a.

Niles Bolton disputed the existence of the claimed violations at the 15 properties it designed that were covered by the Archstone Consent Decree and vigorously litigated the merits of the claims asserted in Archstone's cross-claim for more than three years until discovery closed. *Id.* at 5a, 19a-20a. Three weeks after the close of discovery, on October 24, 2008, Archstone filed a motion for leave to amend its

cross-claim to include a count for contribution. *Id.* at 6a. The parties each filed motions for summary judgment. *Id.* The District Court granted Niles Bolton's motion for summary judgment, dismissing the four counts described above on the grounds that they were preempted by federal law, as they impermissibly sought indemnification in contravention to Congress's purposes in enacting the ADA and FHA. *Id.* at 35a. The District Court also denied Archstone's motion for leave to amend to add a count for contribution because it held that the proposed amendment would prejudice Niles Bolton and that the amendment would be futile. *Id.* at 27a; 603 F. Supp. 2d 814 (D. Md. 2009).

Archstone appealed this final judgment to the United States Court of Appeals for the Fourth Circuit. Archstone Pet. App. 7a. The Fourth Circuit affirmed the District Court on April 19, 2010. 602 F.3d 597 (4th Cir. 2010). Archstone filed its Petition for a Writ of Certiorari (the "Petition") on July 19, 2010. Niles Bolton sought an extension of time in which to submit its Response to the Petition, through and including September 20, 2010. That request was granted by the Clerk of the Court on August 13, 2010.

REASONS FOR DENYING THE PETITION

Review by this Court is not warranted. First, Archstone has produced no compelling evidence of a conflict in the circuits in the way courts address state-law indemnity claims arising out of the ADA and FHA. Second, the Fourth Circuit's opinion is consistent with this Court's conflict preemption precedents. Finally, there are no compelling practical or policy concerns that would justify review on the merits.

A. A Circuit Split Does Not Exist

In its Petition for a Writ of Certiorari, Archstone argues that the Fourth Circuit's decision in this case exacerbates a split among the circuits "over the question whether a no-fault federal statutory scheme that contains no express preemption provision impliedly preempts state-law claims for indemnification." Archstone Pet. at 12. This is a faulty characterization of the Fourth Circuit's decision. It ignores the appropriate approach to conflict preemption analysis for the circumstances presented and fails to establish a basis under Supreme Court Rule 10 for granting the Petition. A close examination of the Fourth Circuit's holding in this case reveals a straightforward application of this Court's conflict preemption analysis. Archstone is an admitted violator of both the FHA and ADA who seeks to shift all of its liability for those statutory violations at properties where Respondent served as architect to Respondent via an indemnity claim. Such a state-law claim stands as an "obstacle to the accomplishment and execution" of the full purposes and objectives of Congress in the enactment of the Fair Housing Act and Americans with Disabilities Act. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 881-82 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Two facts critical to the Fourth Circuit's holding below are nearly ignored by Archstone. First, Archstone is a wrongdoer under the FHA and ADA. It entered into a consent decree admitting liability for violations of the FHA and ADA to the first-party plaintiff. Archstone Pet. 1 and App. 3a. Second, Archstone's cross-claim for indemnity seeks to recover all damages paid to the first-party plaintiffs and all costs of retrofitting the properties that Re-

spondent designed. Archstone Pet. App. 5a. Thus, Archstone seeks to recover from Respondent all of the damages it incurred pursuant to the Consent Decree it executed with the first-party plaintiffs, for all of the properties for which Respondent provided services as an architect. Archstone, the developer and owner of residential housing subject to the design and construction requirements of the FHA and ADA, seeks to transfer its cost of compliance with those statutes to Respondent, an architect who is independently subject to first party liability for any violations of the FHA and ADA to which it contributes. Archstone seeks to accomplish this transfer via the assertion of claims for indemnity, which, taken literally, means that Archstone wishes to divest itself of 100% of its potential liability for its own statutory violations, by assigning that liability to another party. The Fourth Circuit correctly concluded that Archstone could not do this, as the assertion of such state law claims would be antithetical to the purposes, policies and goals behind the enactment of those federal statutes. This is the very essence of conflict preemption.

As will be discussed in detail below, the Fourth Circuit's conflict preemption analysis was appropriately tailored to the circumstances presented by both the facts of this dispute and the particular federal statutes involved. In so doing, the Fourth Circuit adhered to this Court's precedents. Archstone's attempt to characterize the seemingly disparate treatment of a handful of selected cases dealing generally with preemption principles as a "circuit split" ignores the true basis for the different outcomes in those cases, and simultaneously fails to identify any flaw in the analysis undertaken by the Fourth Circuit below. Archstone has failed to satisfy

its burden under Supreme Court Rule 10, and its Petition should accordingly be denied.

1. Archstone Improperly Frames the Issue

The Fourth Circuit's conflict preemption analysis in this case focuses on whether the state-law claims asserted "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Archstone Pet. App. 8a. Fundamental to this analysis is whether the state-law claim "interferes with the methods by which the federal statute was designed to reach [its] goal." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). The Court's ultimate task is to determine whether the state-law claims are "consistent with the structure and purpose of the [particular] [federal] statute as a whole." *Id.* at 98. This is not a formulaic exercise but rather requires a court to examine the goals of the statute and whether the state-law claims are antithetical to those goals. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) ("there can be no one crystal clear distinctly marked formula" to determine whether a state-law claim is preempted). Archstone's framing of the issue as a conflict in the circuits regarding whether "no-fault" federal statutory schemes impliedly preempt state law claims for indemnification is the kind of formulaic abstraction this Court's precedent rejects. Proper conflict preemption analysis requires an examination of the specific goals of the federal legislation in question and the effect of the state law or claim on them. It is unsound to look to different holdings among an amorphous selection of proclaimed "no-fault" statutes and conclude that there is conflict in

the circuits. Specific inquiry does not serve Archstone's purpose in this case, so Archstone has created the appearance of conflict in an analytical framework that has never been accepted by this Court.

2. The Fourth Circuit Correctly Examined the ADA's and FHA's Goals and Purposes

Congress intended for the ADA and FHA's respective remedial schemes to be the exclusive source for redress of any wrong arising under or derivative to the statutes themselves. Numerous cases have evaluated the legislative history and other evidence of this intent in the context of assessing the viability of indemnification claims brought under, or derivative to, the FHA and ADA, with the conclusion that such claims are contrary to the expressed purposes and goals behind the enactment of those statutes. *See, e.g., United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 778-779 (E.D.N.C. 2003); *United States v. Gambone Bros. Dev. Co.*, No. 06-1386, 2008 WL4410093, *8 (E.D. Pa. September 25, 2008); *United States v. Shanrie Co., Inc.*, 610 F. Supp. 2d 958, 960-962 (S.D. Ill. 2009); *Mathis v. United Homes, LLC*, 607 F. Supp. 2d 411, 422-423 (E.D.N.Y. 2009).[1]

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[1] Some of the authority discussed in the above cited decisions examines Congressional intent in the context of attempts to pursue indemnity claims under the FHA and/or ADA, as opposed to the assertion of derivative claims under state law, as is at issue here. The distinction is one without a difference, however, as common sense indicates that evidence of the Congressional intent, and the expressed purposes of the statutes, is as applicable to the context of state law indemnification as to that involving the federal statutes themselves. Manifestly, much if not all of the analysis that appears in the few reported decisions addressing this issue is itself derivative of the analysis undertaken by this Court in its evaluation of an attempted

The Fourth Circuit's preemption analysis below was predicated upon and determined by those purposes and goals, and the intent of Congress in the enactment of each statute. Those purposes and goals are central to the validity of conflict preemption analysis. At the outset it is fundamental to recognize that Archstone does not argue that the federal courts are in conflict over the issue whether state-law indemnity claims are preempted when liability is premised solely on violations of the ADA or FHA. No such conflict exists.

A focus on statutory goals makes it a straightforward exercise to harmonize the cases Archstone contends are in conflict. Archstone cites *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992) as a case in agreement with the Fourth Circuit's decision in this instance. In *Martin*, the Tenth Circuit held that an employer's state-law indemnity action against employees based on violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, worked against the purpose of the FLSA and, therefore, was preempted. *Id.* at 1407-08.

This is not surprising given the purpose of the FLSA. As the *Martin* court noted: "Congress sought to foster an environment in which compliance with the substantive provisions of [the FLSA] would be

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claim for contribution for violations of the Civil Rights Acts in *Northwest Airlines v. Transp. Workers*, 451 U.S. 77 (1981), and revisited during the same Term in *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981). As astutely observed by the court in *Mathis*, in reference to that analysis, "[a]lthough this discussion is under the Civil Rights Act, there is no principled reason to distinguish it from the FHA and ADA anti-discrimination bent. Indeed, the Civil Rights Act also addresses discrimination." *Mathis*, 607 F. Supp. 2d at 429.

enhanced. Compliance with the FLSA will not be furthered if employees must defend against indemnity actions [by employers]." *Id.* at 1408 (internal quotation and citation omitted). The *Martin* court, therefore, adopted the Fourth and Fifth Circuit's reasoning to determine that an "employer who believed that any violation of the [FLSA's] provisions could be recovered from its employees would have a diminished incentive to comply with the statute . . . ." *Id.* at 1407 (quoting *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir. 1986)); *see also*, *Lyle v. Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992).

Martin is consistent with the Fourth Circuit's holding here because the compliance goals of the FHA and ADA are similar to those of the FLSA, which contains a similarly broad regulatory scheme that includes exclusive remedies. Numerous other courts have considered the question presented here relative to the FLSA and have reached the same conclusion as *Martin*. In addition to the Tenth Circuit, the Second, Fourth and Fifth Circuits have found no state-law right of indemnification for employers held liable under the FLSA. *See Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007) ("Class Members' FLSA-based contract, negligence and fraud claims are precluded under a theory of obstacle preemption. Our conclusion is consistent with the rulings of several district courts deeming state claims to be preempted by the FLSA where those claims have merely duplicated FLSA claims."); *Herman v. RSR Security Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999) ("even if the [Fair Labor Standards Act] does not authorize contribution or indemnification, appellant declares that these claims may nonetheless be prosecuted under New York law. This view of the law is flawed

because the FLSA's remedial scheme is sufficiently comprehensive as to preempt state law in this respect."); *Lyle v. Food Lion, Inc.*, 954 F.2d 984, 987 (4th Cir. 1992) ("In effect, Food Lion sought to indemnify itself against Tew for its own violations of the FLSA, which the district court found, and we agree, is something FLSA simply will not allow."); *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir. 1986) ("To engraft an indemnity action upon this otherwise comprehensive federal statute would run afoul of the Supremacy Clause of the Constitution[] and would undermine employers' incentives to abide by the Act . . . .").

It is noteworthy that the Circuit Courts' rejection of state-law indemnity claims arising under the FLSA does not turn on a characterization of that statute as "no-fault," as Archstone would have this Court believe. Instead, these holdings rise from the foundation that the FLSA encompasses a comprehensive regulatory scheme, including remedies for violations of its mandate, which Congress intended to be exclusive, just like the ADA and FHA. A developer, or other responsible party, who has violated the FHA and/or ADA but can shift that liability to others will have a similarly diminished incentive to comply.

3. The Potential Indemnitee's Conduct Is Part of the Court's Evaluation of Whether State-law Claims Conflict with Statutory Goals

One of the cases Archstone cites as "in conflict" with the Fourth Circuit's holding in this case actually analyzes conflict preemption in exactly the same way. It reaches a different result simply because the salient facts are dissimilar. In *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003 (6th Cir. 2009),

the Court held that a claim for indemnity asserted by a manager of a commodities trading branch office against his former employer was not preempted by the Commodities Exchange Act ("CEA"), 7 U.S.C. § 1, *et seq.* 585 F.3d at 1006-07. In *Delay*, the manager was fired from his job. *Id.* at 1004. A short time later, the Commodity Futures Trading Commission ("CFTC") filed suit against him. *Id.* The manager prevailed and sought indemnification under Ohio law from his former employer for his legal fees and expenses in connection with the CFTC action. *Id.* The commodities trading firm argued that the CEA preempted its former manager's claim for indemnification, and the district court dismissed the indemnification claim on that basis. *Id.*

The Sixth Circuit reversed because the former manager was not a wrongdoer under the CEA. *Id.* at 1006. It held that "Congress did not intend to displace the state-law indemnification rights, if any, of parties found *not* to have violated the CEA." *Id.*

In so holding, the court in *Delay* recognized a series of cases from the Second, Third, Fourth, and Ninth Circuits in which state law claims for indemnification by violators of federal securities laws were preempted because "'[a] securities wrongdoer should not be permitted to escape loss by shifting his entire responsibility to another party.'" *Id.*, citing *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989).

The "wrongdoer" determination is critical to the *Delay* court's analysis and allows it to distinguish *Baker, Watts*. *Id.* at 1006-07. The *Delay* court expressly limits its holding to the issue of whether an innocent defendant is entitled to indemnity. *Id.* at 1007. The problem for Archstone here is that it is not

an innocent defendant. It is instead an admitted violator of the ADA and FHA. Archstone Pet. i.

The Fourth Circuit in this case followed *Baker, Watts*, because, unlike the former manager in *Delay*, Archstone is a wrongdoer. It has admitted liability under the ADA and FHA, as it acknowledges in the very first sentence of the Question Presented in its Petition for a Writ of Certiorari. Niles Bolton has not been adjudged liable under the ADA and FHA, so Archstone's assertion that Niles Bolton directly caused Archstone's violations has no support in the record. Archstone has consistently ignored this crucial distinction throughout this litigation and continues to do so here. There is ample authority for the proposition that a party that has violated a federal statute may not shift all of its liability to another by virtue of state law indemnity. *Eichenholtz v. Brennan,* 52 F.3d 478, 483-85 (3d Cir. 1995); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1232 (9th Cir. 1989); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288-89 (2d Cir. 1969). *Lyle v. Food Lion*, 954 F.2d 984, 987 (4th Cir. 1992) is similar to the *Delay* case, except for the most important detail: the party seeking indemnity under state law is innocent in *Delay* and a violator of the Fair Labor Standards Act in *Lyle*. This distinction makes all the difference in the result because allowing a violator of a federal statute to shift all of its liability to another party is an obstacle to the federal statute's purpose, as it removes the risk associated with violating the statute and diminishes an otherwise strong incentive to comply.

4. The Copyright Act and Patent Act Cases Have Different Statutory Goals and Purposes That Lead to Different Preemption Results

The other cases cited by Archstone as being in conflict with the Fourth Circuit's decision here concern statutes with much different goals than the FHA and ADA. In *Foley v. Luster*, 249 F.3d 1281 (11th Cir. 2001), a group of recording companies sued high level distributors of Amway products and their videographer for copyright infringement. The distributors settled with the plaintiffs and cross-claimed against the videographer for indemnification. *Id.* at 1284-1285. The cross-claim went to trial, and the jury found the videographer liable for a share of the settlement sum and for fees incurred by some, but not all, of the distributors. The district court denied the videographer's post-trial motion to dismiss on the ground of preemption. The Eleventh Circuit affirmed the denial, holding that conflict preemption did not bar the cross-claim because "a suit for indemnity is not an obstacle to congressional intent, which was to protect copyright holders in a comprehensive and uniform way." *Id.* at 1287.

Archstone argues that *Foley* is in "square conflict with the decision below" because "[a]n action for indemnity concerning a violation . . ." and FHA obviously would not 'intrude upon' the duties under those laws . . . because, like the Copyright Act, neither contains a fault element with which indemnification might conflict." Archstone Pet. at 18-19. Archstone's argument ignores the purpose of the ADA and FHA and assumes the Copyright Act's goals are the same. "The purpose of Congress is the ultimate touchstone of preemption." *Foley,* 249 F.3d at

1287. The result in *Foley* is wholly inapplicable to the decision below because the stark differences between the Copyright Act and the disability anti-discrimination laws.

The goals of the copyright law are to stimulate the creation and publication of edifying matter by enabling creators to earn a living, either by selling or by licensing others to sell copies of the copyrighted work. *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001), as amended, (May 15, 2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The state law indemnity action did not "*concern the rights of a copyright holder.*" *Foley*, 249 F.3d at 1286 (emphasis in original). Thus, the indemnification claims did not affect the central scope of the Copyright Act: protection of those exclusive rights. The ADA and FHA, on the other hand, aim to address the serious and pervasive social problem of discrimination against the disabled. In addition to protecting persons who have a right to sue under the ADA and FHA, Congress also focused on compliance by developers, contractors, architects and others, thereby preventing discriminatory conduct. This is much more akin to the statutory scheme discussed in *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992) and the other FLSA cases discussed above. Any attempt by a violator of the statutes to shift its compliance costs to another party weakens the incentive to comply and is an obstacle to the statutes' goals.

Archstone's reliance on *Cover v. Hydramatic Packing Co., Inc.*, 83 F.3d 1390 (Fed. Cir. 1996) suffers from the same analytical infirmity. In *Cover*, the holder of a patent for lighting fixture system with a "batt of thermal insulation to protect wiring from

heat produced by a bulb" granted an exclusive license to commercialize his invention. 83 F.3d at 1391. The licensee in turn sold some of the patented insulation to a fixture manufacturer but did not mark the insulation units with the patent number, as required by the Patent Act. *Id.* at 1391-92. The fixture manufacturer sent drawings and specifications to a second manufacturer to manufacture more of the insulation. *Id.* at 1392. The patent holder sent a cease and desist letter to the second manufacturer, sued it for contributory infringement and sued the first manufacturer for direct infringement of his patent. *Id.* The second manufacturer cross-claimed against the first, claiming indemnity for improperly marked goods under Pennsylvania's Uniform Commercial Code ("UCC"). *Id.*

The patent holder settled with the first manufacturer. The district court dismissed the cross-claim holding that the Patent Act preempted the second manufacturer's state-law claim because state law could not impose liability for conduct that was expressly not actionable under federal law. *Id.* at 1392.

The Federal Circuit reversed the holding that the indemnity claim under the UCC was preempted by federal law because "the patentee and the patent code are no longer in the picture" due to the settlement. *Id.* All that remains, the court stated, was a "legal relationship . . . defined and governed by section 2-312(c) of the UCC, which has nothing to do with liability of manufacturers under the patent laws." *Id.* at 1394.

Again, this statutory scheme is completely different from the FHA and ADA. The three purposes of the patent statutes are: (1) to foster and reward inven-

tion, (2) to stimulate further innovation, and (3) to ensure free use of ideas in the public domain. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979). This is similar to Congress's objectives for enacting the Copyright Act. The purpose of the statute is to protect the patent holder's exclusive right. By contrast, the FHA and ADA both protect the rights of disabled persons and ensure compliance by developers, contractors and others with the provisions designed to protect those rights. Allowing Archstone or others subject to first party liability to avoid the cost of compliance via the assertion of indemnity claims against each other diminishes the incentive to comply with these comprehensive statutes.

Finally, Archstone's inclusion of *Engvall v. Soo Line Railroad Co.*, 632 N.W. 2d 560 (Minn. 2001) is another effort to create conflict where none exists. In *Engvall*, an injured railroad employee sued his employer under the Federal Employers' Liability Act ("FELA") after an injury at work. The railroad sued the manufacturer of the locomotive for indemnity alleging negligent design of the handbrake that caused the employee's injuries. The Minnesota Supreme Court reversed a grant of summary judgment in favor of the manufacturer holding that the Locomotive Inspections Act ("LIA") does not preempt state common law negligence actions based on a violation of the LIA. 632 N.W. 2d at 570-571. The court held that a negligence claim based on a violation of LIA would not have any direct or substantial effect on the field of locomotive design, construction and material and therefore was not subject to preemption.

This case is unpersuasive for at least two reasons. First, *Engvall* deals with field preemption, and while Archstone asserts that *Engvall*'s reasoning is perfectly applicable to conflict analysis, this distinction alone renders the case inapposite. Second, other federal courts disagree that the case was correctly decided. *See Roth v. I & M Rail Link, LLC,* 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (rejecting *Engvall*); *Bonner v. Union Pac. R.R.*, No. CV03-134-S-MHW, 2005 WL 1593635, *9 (D. Idaho July 6, 2005) (rejecting *Engvall); Mehl v. Canadian Pac. Ry.,* 417 F. Supp. 2d 1104, 1115 (D.N.D. 2006) (rejecting *Engvall*). There is no conflict among federal circuits on this issue.

Whether a statute may be characterized as "no-fault" is irrelevant to the question of preemption. Neither the ADA and FHA nor federal common law permit indemnity, and provision of such a remedy under state law would impede Congress's objective of promoting compliance by those developing, designing, and constructing properties subject to these statutes, as the Fourth Circuit held here. For these particular statutes, the line for preemption purposes is, and should be, drawn at liability. ADA and FHA compliance goals would be severely impeded if one who has admitted liability for violations could "shift its entire responsibility for federal violations on the basis of a collateral state action for indemnification." *Baker, Watts*, 876 F.2d at 1108. This theme resonates in the analysis of all statutes in which Congress has emphasized compliance by those who are not protected parties under the statute in question. Archstone is not a protected party under the ADA or FHA, it is an admitted violator of those statutes. There is simply no conflict in the circuits concerning the viability of claims for indemnity as-

serted by a party that has violated these federal statutes, or others with similar policies, purposes and compliance goals. Archstone has not presented a compelling reason for this Court to grant its Petition.

B. The Ruling Below Correctly Applies This Court's Preemption Precedents

Archstone also contends that a review is appropriate because the holding below is at odds with this Court's recent preemption cases, in particular *Wyeth v. Levine,* 129 S.Ct. 1187 (2009) and, in any event, because the "regulatory purposes of the FHA and the ADA would [not] be undermined by allowing a claim for indemnity." Archstone Pet. at 26. Archstone is incorrect. The presumption against finding federal preemption of state law does not inform the analysis in this case, which involves a field long regulated by the federal government. Accordingly, the holding below is consistent with this Court's recent preemption precedents, including *Wyeth.* Archstone's second argument is without merit because permitting a violator of the ADA and the FHA to shift its compliance costs would obstruct the goals of these anti-discrimination statutes.

1. The Presumption Against Preemption Does Not Apply

Archstone suggests that all preemption analysis should begin with a presumption against preemption, and that the holding below is defective because the court "did not even mention the presumption against preemption." Archstone Pet. at 25-26. This argument misses the mark as it assumes, without basis, that the presumption applies in this case. "When addressing questions of express or implied preemption," this Court begins with the "assumption

that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). No presumption against preemption applies, however, "when [a] State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). In fact, the opposite is true. *Id.* That is precisely the case here.

"In determining whether a state statute is preempted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress." *California Federal Sav. and Loan Ass'n v. Guerra,* 479 U.S. 272, 280 (1986). The primary purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)-(b)(2). The Congress intended the federal government to play the central role in enforcing the standards with the "sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(3)-(b)(4). The purpose of the FHA is to promote fair housing throughout the United States, including the provision of accessible, "fair" housing for the disabled. 42 U.S.C. § 3601. Part and parcel of this policy is to provide the public with protection against defined discriminatory practices in the development, design, and construction of properties subject to the Act. 42 U.S.C. § 3602(f).

Since the passage of the ADA and the FHA, the federal government has played what is tantamount to an exclusive role in the creation and enforcement of these standards to remedy what this Court has recognized as one of America's "shameful oversights," which causes individuals with disabilities "to live among society shunted aside, hidden, and ignored." *Alexander v. Choate,* 469 U.S. 287, 296 (1985) (internal citation and quotations omitted). The presumption against federal preemption has no part in this case because the ADA and the FHA constitute fields of regulation that not only have been substantially occupied by federal authority for an extended period of time, but also were created due to the absence of any comprehensive, effective regulation by the various states.

Nevertheless, Archstone relies on *Wyeth* for the proposition that preemption is inappropriate because "Congress's 'silence on [a conflict preemption] issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend' to preempt state law claims." Archstone Pet. at 35 (quoting *Wyeth v. Levine,* 129 S. Ct. 1187, 1200 (2009)). This argument cannot withstand scrutiny.

In *Wyeth,* the Supreme Court analyzed the preamble to a Food and Drug Administration (FDA) regulation which proclaimed to preempt any contrary state law. 129 S. Ct. at 1200. The Court declined to defer to this conclusory statement in the preamble. *Id.* at 1201. The Court's independent evaluation determined that congressional intent pointed away from preemption. *Id.* at 1201-03. The Court declined to preempt a state-law tort claim because the federal regulation at issue provided only a safety "floor" for

warning labels for drug manufacturers. Because the FDA did not prohibit manufacturers from adding further warnings to the label, the state-law did not stand as an obstacle to accomplishment of Congress's purposes, but rather, went beyond the FDA in furtherance of those very principles. *Id.* at 1204.

Again, this statutory scheme is very different. To suggest that a state-law indemnity action that allows a statutory violator to shift its compliance costs to other parties furthers the goals of the ADA and FHA is questionable logic at best. Nothing about such an action enhances the protection of disabled individuals from discrimination, or discourages a would-be violator from engaging in discrimination. *Wyeth* also is distinguishable because it deals with regulations involving health and safety – two areas where states have historically played a significant role. *See Gonzalez v. Oregon*, 546 U.S. 243, 271 (2006) ("regulation of health and safety is primarily, and historically, a matter of local concern") (internal citation and quotations omitted). This case, by contrast, involves enforcement of federal laws designed to protect individuals with disabilities – historically a federal occupation. The presumption against preemption is inapplicable here because Congress legislated in a field *not* traditionally occupied by the states.

Further, *Wyeth* involves a situation where state law offers protections greater than those provided by federal law. Such state-law claims are less likely to run afoul of an obstacle preemption analysis because such laws actually further, not impede, Congress's objectives. This is not such a case. Allowing state-law indemnification claims between parties who are both subject to first party liability under the FHA and ADA runs contrary to, rather than in furtherance

of, Congress's expressed purposes regarding the non-delegable duties imposed by those statutes. The court below found that allowing Archstone to eliminate its potential for liability under either statute via the use of indemnification would diminish its incentive to comply with the statutes, thus impeding the goals of the ADA and the FHA. Archstone Pet. App. 10a. This case does not involve a parallel state law that furthers the goals of the federal statute at issue, as in *Wyeth*. Instead, the question here is whether a party that has admittedly violated its non-delegable duties under the ADA and FHA, and incurred resulting compliance costs, may shift those costs to another party through state-law indemnity. This Court should reject Archstone's attempt to distill from *Wyeth* a broad anti-preemption principle that has no bearing here.

Archstone's criticism of the Fourth Circuit's reliance on *Abbott v. Am. Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988) in support of the principle that "[p]reemption under an obstacle preemption theory is more an exercise of policy choices by a court than strict statutory construction" is unfounded. Under the circumstances presented, nothing about that statement is in conflict with this Court's conflict preemption case law. Implied conflict preemption, at issue in this case, ultimately turns on the meaning of the Supremacy Clause. *See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984) (state laws that conflict with federal law are preempted "by direct operation of the Supremacy Clause"). That constitutional provision employs broad language that favors preemption – that "the laws of the United States . . . shall be the supreme law of the land . . . any Thing in the

Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

In light of this broad constitutional mandate, courts must engage in "an exercise of policy choices" *Abbott,* 844 F.2d at 1113, to strike the appropriate balance between competing laws. In accordance with applicable precedent, the Fourth Circuit's analysis below was governed by the nature of the federal statutes at issue and their goals and policies. Importantly, the policy choices at issue here are those made by Congress, as explicitly stated in the legislative history and other sources set forth in authorities cited above. Thus, the only exercise conducted here was the determination of Congressional intent behind the enactments of the FHA and ADA, a completely proper undertaking

2. The Presumption, Even If Applicable, Is Sufficiently Overcome

Where compliance with both federal and state law is possible, state law is still preempted if application of state law would frustrate the purpose of the federal law. *See Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.,* 168 F.3d 1362, 1369 (D.C. Cir. 1999) (holding that state-law claims would frustrate federal policy under the Higher Education Act and stand as an obstacle to Congressional purposes and objectives). Here, all of Archstone's claims derive from alleged ADA and FHA violations. To allow indemnification claims based upon those violations to proceed, when the comprehensive remedial schemes of both the FHA and ADA prescribe exclusive remedies and plainly do not contemplate such claims between co-defendants, would itself frustrate the goals of these Acts.

The court in *Access4All, Inc. v. Trump Int'l Hotel & Tower Condo.*, No. 04-CV-7497, 2007 WL 633951, at *24 (S.D.N.Y. Feb. 26, 2007) addressed this issue in the context of the ADA: "Additionally, even if Plaintiff had authority that such a right might exist in New York common law, it would raise the specter that any state-law right to indemnity would be preempted by the extensive remedial scheme of the ADA." With respect to the FHA, the courts in *Mathis v. United Homes, LLC,* 607 F. Supp. 2d 411 (E.D.N.Y. 2009) and *United States v. Murphy Development, LLC*, No. 3:08-0960, 2009 WL 3614829 (M.D. Tenn. Oct. 27, 2009) reached similar conclusions. "Congress, in discussing the need for enhancing remedies to combat discrimination in housing, determined that enforcement should be bolstered by giving HUD new powers, not by permitting co-defendants to sue each other for contribution [and/or indemnity]." *Mathis,* 607 F. Supp. 2d at 422. "Third-Party Plaintiffs' state law claims for express or implied indemnity and/or contribution will also be dismissed with prejudice because they are de facto claims for indemnity and contribution that are preempted by federal law. Such derivative indemnity and contribution claims are barred because allowing recovery under state law for indemnity and/or contribution would frustrate the achievement of Congress' purposes in adopting the FHA and the ADA." *Murphy*, 2009 WL 3614829 at *2.

3. Archstone's Indemnity Claims Are Incompatible With the Goals of the ADA and the FHA.

Archstone argues that state-law indemnity claims are compatible with statutory goals and that the Fourth Circuit misinterpreted the scope of Archstone's

"non-delegable duty to comply with the ADA and [the] FHA." Archstone Pet. at 26. Archstone relies on two cases to support its contention that the statutory non-delegable duty does not preclude it from asserting an indemnity action. The first, *Meyer v. Holly,* 537 U.S. 280 (2003), has no real application to the issues before this Court. In *Meyer,* the Supreme Court held that a corporation's principal shareholder could not be held liable under the FHA for discriminatory acts of another employee, which were attributable to the corporation because they were committed in the course of his employment for the corporation. Archstone uses this case to argue that its liability under the FHA is "vicarious." Archstone, who is an experienced, successful developer and owner of multi-family properties subject to the FHA and ADA, has raised this argument unsuccessfully at each level of this proceeding. In so doing, Archstone has unfortunately made it very clear that it does not accept direct responsibility for compliance with these statutes.

Rather, and only begrudgingly, Archstone acknowledges only "vicarious" liability for violations of the FHA and ADA at the properties it develops, owns and offers to the public. Archstone argues in effect that any liability attaching to it arises not as a result of the unique role it plays as the developer and owner of residential housing properties marketed to the general public, but solely by virtue of the fact that it hired other, "more culpable" parties to design, build and possibly manage its properties. Implicit in this argument is Archstone's belief that only architects, contractors and managers need concern themselves with understanding the intricacies of accessible design and construction that are a prerequisite for compliance with the FHA and ADA. This position is

simply wrong and runs counter to the Congressional purposes behind the enactment of both statutes. Archstone's liability under these Acts is express and direct – not derivative, technical, or based on agency principles.

In this vein, Archstone's complaint that the owners of apartment projects are merely "expedient" targets for plaintiffs seeking to raise issues of non-compliance with the requirements of the FHA and/or ADA rings hollow. Archstone Pet. at 27. The entity with the greatest control of the construction process – indeed the entity with ownership of both the final product and the very idea itself – is the developer/owner. The entity in the "best position to prevent" statutory violations is surely the one with absolute authority over all decisions related to the project - the developer/owner.

The second case, *Ellison v. Shell Oil Co.*, 882 F.2d 349 (9th Cir. 1989) does nothing to help the cause of Archstone's Petition. First, *Ellison* deals with "partial indemnity," which is another way of saying contribution. Archstone did not bring a claim for contribution against Niles Bolton, and the Fourth Circuit's opinion below did not address the viability of a claim for contribution asserted by one who has admittedly violated the ADA and FHA. Second, there is no discussion of preemption in *Ellison*, presumably because it was not raised. Archstone's citation to *Ellison* in support of its claim that the Fourth Circuit incorrectly performed its preemption analysis is therefore misplaced.

Finally, Archstone's argument that indemnity claims actually further rather than undermine the purpose of the ADA and the FHA, because "Congress could not have intended to allow an architect who

caused statutory violations to walk away," disregards the obvious. Architects are charged with a non-delegable duty to comply with the requirements of those statutes and remain liable to putative plaintiffs for any violations to which they contribute. Archstone Pet. at 28; *See Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664-65 (D. Md. 1998) (architects and builders, as well as owners, have direct liability under the FHA). Archstone surprisingly cites to *Baltimore Neighborhoods* in support of the proposition that allowing an owner to sue an architect for indemnity would prevent an architect from avoiding liability under the FHA, which "would obstruct the purposes of the FHA." Archstone Pet. at 28.

Archstone's reliance on *Baltimore Neighborhoods* is misguided, however, because the seminal point is simply that an architect, like any other party to the design and construction process, may be subject to first party liability under the FHA for any violation to which he contributes. 3 F. Supp. 2d. at 665. ("By this, the Court does not suggest that all participants are jointly and severally liable for the wrongful actions of others regardless of their participation in the wrongdoing, but rather, that those who are wrongful participants are subject to liability . . . ."); *see also, United States v. Shanrie Co., Inc.*, No. 05-306-DRH, 2007 WL 980418, at *7 (S.D. Ill. March 30, 2007). It does not in any way hold or suggest that an architect can or should be liable to indemnify another party who is equally subject to first party liability. As a practical matter, Archstone's settlement with the original plaintiffs here did not end Respondent's exposure to liability to the first-party plaintiffs. That exposure continued until Respondent's Consent Decree with the first-party plaintiffs, executed in

March 2007, after more than two years of litigation. Fundamentally, Archstone's "public policy" argument loses sight of the fact that developer/owners are not just the "most expedient" targets for suits alleging non-compliance, but also often the most deserving.

C. Archstone's Bases For Its Claim of "Substantial Practical Importance" Do Not Justify Review

Archstone repeats its contention that architects may "go free" and unpunished for FHA and ADA violations if the Fourth Circuit's decision below is left undisturbed, but relies primarily upon 28 C.F.R. § 36.201(b) as the basis of its final ground for review by this Court. Archstone cites to this regulation as support for its argument that indemnity for violations of the ADA is not only not antithetical to the purposes of the ADA, but is "uncontroversial." Archstone Pet. at 30. 28 C.F.R. § 36.201(b) is an idiosyncratic regulation promulgated by the Department of Justice that is limited to the peculiar circumstances of the landlord tenant relationship and the statutory framework of the ADA. Archstone cites to this regulation as support for its broad proposition that, significant authority and legislative history to the contrary, state-law indemnification rights exist for all those who violate the ADA. As with Archstone's other arguments, even cursory analysis reveals this to be an untenable position.

Section 36.201(b) does allow an owner of a public accommodation and its tenant to allocate responsibility for compliance with the obligations of the ADA between themselves, by lease or other contract. However, the legislative history of the ADA confirms that no covered entity may use a "contractual provision to reduce any of its obligations under [the] Act."

Botosan v. Paul McNally Realty, 216 F.3d 827, 833 (9th Cir. 2000). The analysis undertaken in *Botosan* is instructive, because the court begins its discussion by firmly stating that "[o]wners of public accommodations should not be permitted to contract away liability." *Botosan*, 216 F.3d at 834. That is precisely what Archstone is asking this Court to sanction here. The court continues:

> In the proposed version of 28 C.F.R. § 36.201, the DOJ allocated responsibility for providing auxiliary aids and services solely to the tenant. *See* 28 C.F.R. ch. I, pt. 36, app. B., at 594. Groups representing persons with disabilities objected to the proposed rule because, in their view, it permitted a landlord to circumvent the ADA by leasing to smaller entities for which ADA compliance would not be "readily achievable." In response, the DOJ eliminated the provisions listing specific allocations to specific parties in the final rule, and instead, permitted the parties to allocate responsibility.

Id.

The "readily achievable" issue is significant. An economic feasibility defense to ADA compliance is valid because the term "readily achievable" takes into account the financial profile of the covered entity in assessing whether the removal of barriers required for compliance is possible. *See* 42 U.S.C. § 12181(9). Public interest groups feared that landlords would escape their ADA liability altogether by leasing solely to "smaller" tenants, who could then object to compliance with the ADA's requirements on the basis that the work required to comply was not "readily achievable" due to financial constraints. Under the proposed version of the regulation, which placed

responsibility on the tenant alone, a lease arrangement with tenants for whom compliance was not financially achievable would leave a plaintiff with no genuine recourse against either the tenant or the landlord. To prevent this outcome, in the final version of 28 C.F.R. § 36.201, the DOJ allowed the landlord and tenant to allocate responsibility for ADA compliance in their lease.

The resulting bargain is this: The legislative history outlawing the use of a contractual provision to reduce obligation under the Act is satisfied because both the tenant and the landlord remain exposed to liability. This interpretation furthers the ADA's purpose because "[n]ot only does this construction of the regulation hamper efforts of a landlord and a tenant to evade ADA requirements, but it also aids in the enforcement of the Act. A landlord who is aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." *Id.* As the regulation is interpreted by the DOJ, "landlord is a necessary party in an ADA action, regardless of what the lease provides. The landlord can in turn seek indemnification from the tenant pursuant to their lease agreement." *Id.* Most importantly, the potential for a situation in which no party would be responsible for compliance with the ADA was removed.

In making this compromise the DOJ can hardly be said to have "necessarily concluded that indemnity between defendants is not antithetical to the purposes of the ADA," as Archstone unabashedly states. Archstone Pet. 30. The regulation is narrowly designed, intended and interpreted to reflect the economic realities of the landlord and tenant relationship, and to maximize, not minimize, compliance

with the ADA. It has no application, explicitly or implicitly, to owners and architects, as the Fourth Circuit recognized. Archstone Pet. App. 10a. Archstone, as the owner/developer, and Niles Bolton, as the architect, are bound to comply with the requirements of the ADA and FHA in the design and construction of covered housing units, and each may be sued by any aggrieved persons for failures to meet those requirements.

CONCLUSION

Archstone has not presented any compelling reasons for this Court to grant its Petition. Respondent respectfully requests that it be denied.

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No. 10-103

In the Supreme Court of the United States

ARCHSTONE MULTIFAMILY SERIES I TRUST and ARCHSTONE,

Petitioners,

v.

NILES BOLTON ASSOCIATES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. The Holding Below Exacerbates A Circuit Split Over When Federal Statutes Preempt State-Law Indemnification Remedies 1

B. Review Is Also Warranted Because The Decision Below Is Inconsistent With This Court's Conflict-Preemption Precedents And Is Clearly Incorrect 4

C The Issue Here Is Of Substantial Practical Importance 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Baltimore Neighborhoods, Inc. v. *Rommel Builders, Inc.*,
3 F. Supp. 2d 661 (D. Md. 1998) 9

Botosan v. *Paul McNally Realty*,
216 F 3d 827 (9th Cir 2000) 6, 10, 11

Cover v. *Hydramatic Packing Co.*,
83 F 3d 1390 (Fed. Cir. 1996) 3, 4

Delay v. *Rosenthal Collins Group, LLC*,
585 F.3d 1003 (6th Cir. 2009) 2, 3

Ellison v. *Shell Oil Co.*,
882 F.2d 349 (9th Cir. 1989) 8, 9

Engvall v. *Soo Line R.R Co*,
632 N.W.2d 560 (Minn. 2001) 4

Fireman's Fund Ins. Co. v. *W. Nat'l Mut. Group*, 851 F. Supp. 1361 (D Minn. 1994) 7

Foley v. *Luster*,
249 F.3d 1281 (11th Cir. 2001) 3

Martin v. *Gingerbread House, Inc.*,
977 F.2d 1405 (10th Cir. 1992) 1, 2

Meyer v. *Holley*,
537 U S. 280 (2003) 8, 9

Nw. Airlines, Inc. v *Transp. Workers Union*,
451 U.S. 77 (1981) 7

Rice v. *Santa Fe Elevator Corp.*,
331 U.S. 218 (1947) 5

Rosen v. *Montgomery County*,
121 F.3d 154 (4th Cir. 1997) 8

TABLE OF AUTHORITIES—continued

Page(s)

Sessions v. *Johnson*,
95 U.S. 347 (1877) 9

United States v. *Locke*,
529 U S. 89 (2000) 5

United States v *Paxton Landfill Corp.*,
No. 84C8531, 1985 WL 4087
(N.D Ill. Nov. 25, 1985) 7

Wash. Sports & Entm't, Inc. v. *United Coastal Ins. Co.*, 7 F Supp. 2d 1 (D D.C. 1998) 8

Wyeth v *Levine*,
129 S Ct. 1187 (2009) 6, 7, 8

STATUTES AND REGULATIONS

42 U.S.C. § 3604(f)(5)(C) 5

28 C.F.R. § 36.201(b) 11

OTHER AUTHORITIES

David E. Adelman & Kirstin H. Engel,
Reorienting State Climate Change Policies to Induce Technological Change, 50 ARIZ. L. REV. 835 (2008) 5

Department of Justice, Technical Assistance Manual on the Americans With Disabilities Act § III-1.2000 (1993) 10, 11

REPLY BRIEF FOR PETITIONERS

We explained in the petition that this case is a prime candidate for certiorari: It presents a deep conflict among the lower courts on an important question of federal preemption and involves an erroneous decision by the Fourth Circuit that could not only interfere with the effective enforcement of this nation's disability laws but also jeopardize the contractual rights of every entity whose business is governed even in part by a federal regulatory scheme. Respondent Niles Bolton's attempts to challenge each of these bases for certiorari fall flat, and thus this Court's review is warranted.

A. The Holding Below Exacerbates A Circuit Split Over When Federal Statutes Preempt State-Law Indemnification Remedies.

In our petition, we identified a circuit split over whether and when no-fault federal statutes preempt state-law indemnification remedies among parties jointly liable for a violation of that federal scheme. Pet. 12–24. Niles Bolton attempts to distract from this split by arguing that it is "unsound to look to different holdings among an amorphous selection of proclaimed 'no-fault' statutes and conclude that there is conflict in the circuits." Opp. 6–7. But the statutes cited in the petition are equivalent in all material respects, and they illustrate a real conflict among the circuits on an important and broadly applicable principle of preemption law.

1. Niles Bolton concedes that *Martin* v. *Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992), is

"consistent with the Fourth Circuit's holding here." Opp. 9.[1] Thus, on one side of the split, the Fourth and Tenth Circuits have held that no-fault federal statutes impliedly preempt state-law indemnification claims based upon the unsupported assumption that indemnification "diminishes [a party's] incentive to ensure compliance" with a "regulatory" law. Pet. App. 10a; see also *Martin*, 977 F.2d at 1407. And to the extent that the "Second, Fourth and Fifth Circuits have [also] found no state-law right of indemnification for employers held liable under the [Fair Labor Standards Act]," Opp. 9, that only serves to deepen the circuit split we identified with the Sixth, Eleventh, and Federal Circuits.

2. In stark contrast with the Fourth and Tenth Circuits, the Sixth Circuit has held that a necessary "predicate" to finding a state-law indemnification suit preempted "is that the party seeking indemnification is a 'wrongdoer'" under the purportedly preempting federal law. *Delay* v. *Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1006 (6th Cir. 2009). Niles Bolton argues that the Sixth Circuit "reaches a different result simply because the salient facts are dissimilar," Opp. 10, but this argument rests on the faulty assumption that "Archstone is a wrongdoer," Opp. 12.

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[1] Although Niles Bolton asserts that the Tenth Circuit's "rejection of state-law indemnity claims arising under the FLSA [did] not turn on a characterization of that statute as 'no-fault,'" this is beside the point. Opp. 10. Niles Bolton does not deny—nor could it—that the FLSA is a no-fault statute, and thus even if the Tenth Circuit did not explicitly rely on this fact in reaching its decision, that court indisputably held that a no-fault statute impliedly preempts state-law indemnification claims *Martin*, 977 F.2d at 1407.

Niles Bolton's argument betrays its fundamental misunderstanding of the nature of the FHA and the ADA. Niles Bolton does not, and cannot, contest that the FHA and the ADA are strict liability statutes. Pet. 14. As such, neither statute requires that a defendant have acted negligently, recklessly, or deliberately wrongfully before imposing liability. *Ibid.* It is precisely the point, then, that Archstone need *not* be a wrongdoer to be held liable for violating either of the statutes. Indeed, a party subject to the statutes can be found liable for an identified violation even if it did everything within its power to comply. The owner of a covered property would be liable, for example, even if it hired a compliance specialist to check each and every aspect of its property. *Delay*—which holds that indemnification is preempted only when the violator of a federal law is a wrongdoer—is thus directly contrary to the Fourth Circuit's decision in this case—which holds that indemnification is preempted *regardless* whether the violator of a federal law is a wrongdoer.

3. Niles Bolton also misses the mark in its efforts to distinguish *Foley* v. *Luster*, 249 F.3d 1281 (11th Cir. 2001), and *Cover* v. *Hydramatic Packing Co.*, 83 F.3d 1390 (Fed. Cir. 1996), as cases that "concern statutes with much different goals than the FHA and ADA." Opp. 13. Indeed, Niles Bolton overlooks the fact that the purposes of the statutes at issue are functionally equivalent.

Under all of these statutes—the Copyright Act, the patent statutes, the FHA, and the ADA—"a suit for indemnity between defendants * * * is not an obstacle to congressional intent," because Congress's primary intention was to "protect [*plaintiffs*] in a comprehensive and uniform way." *Foley*, 249 F.3d at

1287 (emphasis added). Indeed, these statutes define obligations only as between plaintiffs and defendants, and once the plaintiffs have been made whole, by settlement or otherwise, the statute's goals have been met and the statutory scheme is "no longer in the picture." *Cover*, 83 F.3d at 1393. Because the FHA and the ADA are parallel in this regard to the Copyright Act and the patent laws, these decisions are flatly inconsistent with the decision below.

4. Finally, Niles Bolton is wrong to dismiss the relevance of *Engvall* v. *Soo Line R R Co*, 632 N.W.2d 560 (Minn. 2001). Opp. 16–17, because the case involves circumstances analytically indistinguishable from those at issue here. See Pet. 23. And to the extent that "other federal courts disagree that the case was correctly decided," Opp 17, this provides further evidence of the disagreement among the lower courts on the question presented.

* * * * *

In sum, this case presents a clear circuit conflict on overarching principles of federal preemption Niles Bolton fails in its efforts to disassemble the split, and certiorari accordingly should be granted.

B. Review Is Also Warranted Because The Decision Below Is Inconsistent With This Court's Conflict-Preemption Precedents And Is Clearly Incorrect.

As we demonstrated in the petition, the decision below is inconsistent with this Court's longstanding presumption against preemption and plainly incorrect Pet. 24–29. In response, Niles Bolton argues that the presumption against preemption does not apply, or alternatively that the presumption is over-

come. Opp. 18–28. These arguments are as unpersuasive as they are unsupported.

1. Niles Bolton is wrong to suggest that "[n]o presumption against preemption applies" here because the FHA and ADA fall within "'an area where there has been a history of significant federal presence.'" Opp. 19 (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)) Building codes offer a paradigmatic example of an exercise of historic state police powers. "[A]s a quintessential state function, building codes [generally] lie outside the province of federal authority." David E. Adelman & Kirstin H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 875 (2008). Indeed, the FHA *itself* recognizes the historical role of states in this arena by expressly encouraging "[s]tates and units of local government to include in *their existing procedures* for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings" comply with federal requirements 42 U.S C. § 3604(f)(5)(C) (emphasis added).

Because building codes involve historic police powers of the state, and the FHA and ADA are novel extensions of the federal government into this historically state-controlled arena, Niles Bolton must concede that "this Court begins with the 'assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Opp. 18–19 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U S. 218, 230 (1947)). Thus, the presumption against preemption controls, and Congress's "silence on [a conflict-preemption] issue, coupled with its certain

awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" to preempt state-law claims. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1200 (2009).

Niles Bolton's efforts to distinguish *Wyeth* do not detract from the force of the presumption against preemption. In *Wyeth*, this Court recognized that the "Federal Government has regulated drug labeling for more than a century," but stressed that it relied on the "presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly preempt state-law causes of action.'" *Id.* at 1195 n.3. The same principle applies with even more force here because building codes are traditionally the province of the state. Additionally, the fact that "*Wyeth* involves a situation where state law offers protections greater than those provided by federal law" is of no moment. Opp. 21. This Court's reasoning that "[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the [statute's] history," *Wyeth*, 129 S. Ct. at 1200, applies equally whether or not the state action enhances protections.[2]

The Fourth Circuit accordingly erred by ignoring this Court's recent conflict-preemption case law, and

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[2] In any event, allowing indemnification actions does not diminish the protections for first-party plaintiffs because an owner "who is aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000). See page 10–11, *infra*.

in particular the Court's analysis of congressional silence in *Wyeth*.

2. Niles Bolton is also wrong to suggest that the presumption against preemption is overcome here. Opp 23. It first argues that "both the FHA and ADA prescribe exclusive remedies and plainly do not contemplate such claims between co-defendants." *Ibid.* But Niles Bolton does not and cannot offer a shred of evidence that Congress thought about this issue or intended to preempt state-law indemnification actions. And under the presumption against preemption, congressional "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" to preempt state-law claims *Wyeth*, 129 S. Ct at 1200. Without any evidence of contrary congressional intent,[3] congressional silence simply is not enough.[4]

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[3] The absence of a statutory right of indemnification under the ADA and the FHA is no evidence of congressional intent to preempt state-law indemnification actions Courts have routinely held that state-law claims for indemnity are permissible, even in the absence of a federal right to indemnification See, *e.g.*, *Fireman's Fund Ins Co.* v *W. Nat'l Mut. Group*, 851 F Supp 1361, 1366 (D Minn. 1994), *United States* v *Paxton Landfill Corp* , No 84C8531, 1985 WL 4087 (N D Ill Nov. 25, 1985)

[4] Niles Bolton asserts on a related point that the identical standard governs whether there is an implied *federal* right to indemnification under the FHA and ADA as whether those federal statutes preempt *state-law* contractual rights to indemnity Opp 7 n 1. But there is a presumption *against* finding implied rights of action under federal law, *Nw. Airlines, Inc.* v *Transp. Workers Union*, 451 U S. 77, 94 (1981), whereas the presumption against preemption creates a strong presumption *in favor* of permitting state-law claims *Wyeth*, 129 S Ct. at 1200

3. Niles Bolton also disputes our explanation, Pet. 26–29, that Archstone's state-law indemnity claims are compatible with the purposes of the FHA and the ADA. Opp. 24–28. These arguments lack merit.

First, Niles Bolton attempts to distinguish *Meyer* v. *Holley*, 537 U.S. 280 (2003), and *Ellison* v. *Shell Oil Co.*, 882 F.2d 349 (9th Cir. 1989)—which establish that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules," *Meyer*, 537 U.S. at 285—on the ground that Archstone's liability to the first-party plaintiffs in this case was express and direct, not vicarious. But Niles Bolton cannot contest Archstone's characterization of the FHA and the ADA as strict liability statutes. Pet. 4, 7. Thus, Archstone may be liable, without regard to knowledge, intent, or negligence, merely because it owns properties that violate the ADA.[5] This result mirrors vicarious liability principles commonly applied under the FHA and the ADA. See *Rosen* v. *Montgomery County*, 121 F.3d 154, 157 n.3 (4th Cir. 1997) (finding that "liability may be imposed on a principal for the statutory violations of its agent" under the ADA); *Wash. Sports & Entm't, Inc.* v. *United Coastal Ins. Co.*, 7 F. Supp. 2d 1, 10 (D.D.C. 1998). Accordingly, Archstone's liability for those violations

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[5] Notably, Niles Bolton does not suggest that Archstone took affirmative steps to permit, encourage, or perpetuate the statutory violations. And to the extent that Niles Bolton suggests Archstone was contributorily negligent, see, *e.g.*, Opp. 25–26, that assertion pertains to the merits of Archstone's state-law indemnification claim and is not a basis for federal preemption.

may properly be characterized as vicarious, and *Meyer* and *Ellison*[6] are on point.

Second, Niles Bolton argues indemnity actions do not further the purposes of the FHA and the ADA because architects remain liable to first-party plaintiffs. Opp. 26–28. But as a practical matter, architects will likely escape liability under the court of appeals' decision because owners are the most expedient targets for litigation and plaintiffs "can have but one satisfaction for the same injury." *Sessions* v. *Johnson*, 95 U.S. 347, 348 (1877). And despite Niles Bolton's rhetoric to the contrary, Opp. 26, architects are self-evidently in a better position to ensure that designs comply with the FHA and the ADA than building owners; it thus seems exceedingly unlikely that Congress would have intended to allow an architect who caused statutory violations of the FHA or ADA to walk away from the accessibility violations it caused without paying even a dollar to remedy them. See, *e.g.*, *Baltimore Neighborhoods, Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664 (D. Md. 1998) (observing that "allowing [the] architect[] * * * to escape liability" would obstruct the purposes of the FHA).

C. The Issue Here Is Of Substantial Practical Importance.

In our petition, we established three reasons why this case presents a matter of exceptional importance. *First*, the decision below will discourage set-

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[6] Niles Bolton also attempts to distinguish *Ellison* on its facts, Opp. 26, but Niles Bolton cannot avoid the Ninth Circuit's holding that state-law claims among jointly liable parties are enforceable despite a non-delegable duty arising under the governing federal statute. See *Ellison*, 882 F.2d at 353

tlement and force owners and developers to litigate cases to the bitter end in order to obtain a judicial apportionment of liability. Pet. 29 *Second*, the decision below will jeopardize the continuing validity of the Department of Justice regulation that expressly permits owners and commercial tenants to contractually allocate responsibility for ensuring compliance with the ADA. Pet. 30 *Third*, the decision below by its very terms would invalidate insurance agreements that provide coverage for non-willful violations of federal law, because there is no plausible basis under the Fourth Circuit's reasoning for distinguishing insurance from other indemnity agreements. Pet. 31. Niles Bolton offers no response to the first and third points, and its response to the second point is simply incorrect.

The fundamental flaw in Niles Bolton's argument is the fallacy that Archstone is asking this Court to permit it to "'contract away liability'" under the ADA Opp. 29 (quoting *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000)). Archstone acknowledged its liability to the first-party plaintiffs and it resolved that liability by entering into a consent decree whereby it agreed to retrofit 71 properties and pay $1.4 million in damages. Pet App. 3a Rather than trying to contract away *liability*, Archstone seeks to enforce a contractual right to *indemnification*. This is precisely the type of contractual allocation of responsibility expressly endorsed by 28 C.F.R. § 36.201(b) and *Botosan*.

As the Technical Assistance Manual issued by the DOJ to assist with ADA compliance explains, "any allocation made in a lease or other contract is only effective as between the parties, and both [parties] remain fully liable for compliance with all pro-

visions of the ADA." Department of Justice, Technical Assistance Manual on the Americans With Disabilities Act § III-1.2000 (1993). Thus, "the landlord is a necessary party in an ADA action," but "[t]he landlord can in turn seek indemnification from the tenant pursuant to their lease agreement." *Botosan*, 216 F.3d at 834. Niles Bolton's attempts to distinguish the contractual indemnification provision in this case ring hollow because there is no plausible reason why an owner's indemnity claims against a tenant would be consistent with the ADA while that same owner's indemnity claim against an architect would create a conflict requiring preemption.[7]

Accordingly, review is warranted because the decision below constructively invalidates an important DOJ implementing regulation and undermines the enforceability of insurance contracts covering insured parties' vicarious liability for violations of federal statutes.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[7] Niles Bolton's reliance on the "readily achievable" language in *Botosan* replicates the same fundamental flaw in analysis. Opp. 29-30. In *Botosan*, the court recognized that a contractual allocation of indemnification "aids in the enforcement of the Act," because an owner who is "aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." 216 F.3d at 834. Thus, the decision did not turn on the whether the controlling legal standard required readily achievable accommodations, it turned on whether the plaintiffs would have recourse and whether the owners retained an incentive to comply.

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OCTOBER 2010